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I Do approve the Publishing of the Reports of this Learned and Judicious Author for the benefit of the Students of the Law.

Fra. North.

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Select CASES

Vol. 2. 15
In B. R. 22, 23, & 24. C A R. I. Regis,

REPORTED

B Y

JOHN ALET late of
Greys Inn Esq;

WITH

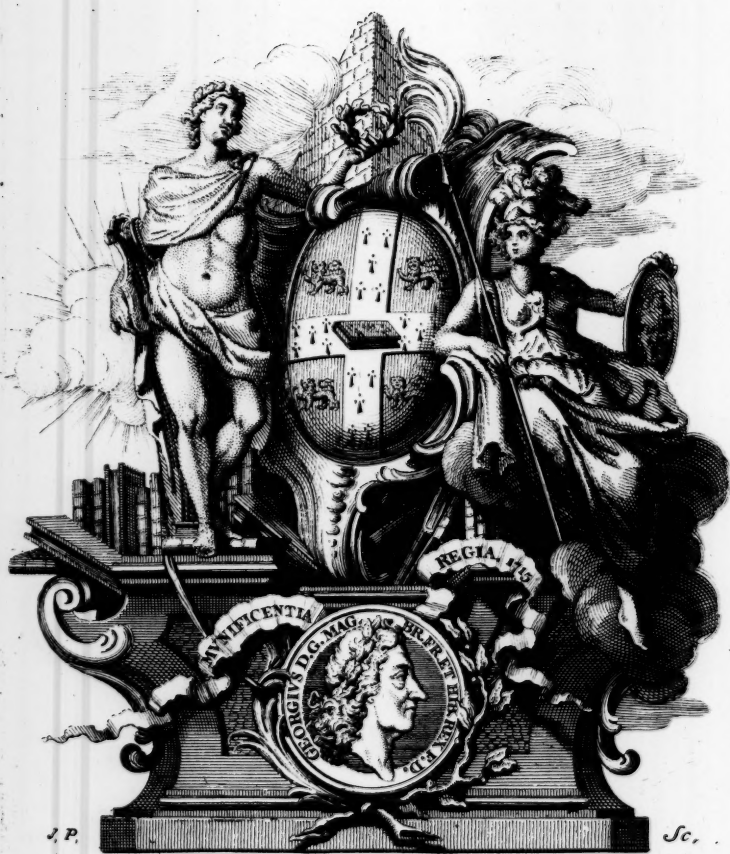
T A B L E S of the Names of the Cases
and of the matters therein contained:

A L S O

Of the Names of the Learned Council who
Argued the same.

L O N D O N,

Printed for *Robert Pawlet*, at the Bible in *Chancery-
Lane* near *Fleet-street*, 1681.



90...485

A TABLE

OF THE

Names of the Cases contained in this BOOK.

A		
A ndrews <i>versus</i> Harbor. Page 12		
Aylwin <i>versus</i> Taylor 93		
B		
B afield <i>versus</i> Collard 1		
Banfield <i>versus</i> Brown 53		
Beaton <i>versus</i> Forrest 65		
Bernard <i>versus</i> Bonner 58		
Blackwell <i>versus</i> Ashton 21		
Sir Thomas Bowes Case 4		
Dame Bowles <i>versus</i> Broadhead 88		
Brook <i>versus</i> Brook 24		
Brown <i>versus</i> Evering 20		
Brown <i>versus</i> Wood 36		
Dr. Bruces Case 50		
C		
C aly <i>versus</i> Jollin & Ux. 34		
Capel <i>versus</i> Allen 10		
Chappel <i>versus</i> Goodhouse 61		
Sir John Chichesters Case 12		
Coleman <i>versus</i> Painter 19		
Com. Northumberland <i>versus</i> Green 33		
	Combs <i>versus</i> Cheny 92	
	Sir Anthony Ashly Cooper <i>versus</i> St. John 84	
	Creswell & Ux. <i>versus</i> Ventres & Ux. 57	
	D	
	D avis <i>versus</i> Dyos 91	
	Dent <i>versus</i> Scot 61	
	Dod <i>versus</i> Robinson 63	
	Duncomb <i>versus</i> Tickridge 94	
	Dunsh <i>versus</i> Smith 62	
	Dutton <i>versus</i> Eaton 30	
	E	
	E dwards <i>versus</i> French 6	
	Eels <i>versus</i> Lambert 38	
	Eels <i>versus</i> Smith 37	
	Ethringham <i>versus</i> Ethringham 2	
	Evely <i>versus</i> Livermore 4	
	F	
	F aldo <i>versus</i> Pindar 60	
	Farrer <i>versus</i> Bates 4	
	Freeborn <i>versus</i> Pincras 68	
	Eryer <i>versus</i> Prentice 20	
	Fyner <i>versus</i> Jeffrys 21	
	A	Gawdy

The Table.

G		Long <i>versus</i> Bennet 20	
Ludlow <i>versus</i> Beckwith 90			
G Awdy <i>versus</i> Congham 37		M	
Gilbert <i>versus</i> Stone 35		M Ark <i>versus</i> Cubit 35	
Gurman <i>versus</i> Hill 26		Markham <i>versus</i> Adamson 2	
H		More <i>versus</i> Clypsham 32	
H Ains <i>versus</i> Finch 6		Morefield <i>versus</i> Web 64	
Halls <i>Cafe</i> 51		Munday <i>versus</i> Bailly 29	
Hart <i>versus</i> Buckminster 52		N	
Harvy <i>versus</i> Thorn 62		N Eedler <i>versus</i> Guest 9	
Hinacre <i>versus</i> Lemon 5		Newman <i>versus</i> Zachary 3	
Hill <i>versus</i> Armstrong 55		O	
Hill & Ux. <i>versus</i> Bird 56		O Sborn <i>versus</i> Brook 7	
Hilliard & Ux. <i>versus</i> Hambridg. 36		P	
Hilton <i>versus</i> Plate 13		P Age <i>versus</i> Harwood 43	
Hobson <i>versus</i> Wills 53		Paine <i>versus</i> Sheltrop 13	
Hodson <i>versus</i> Sir Arthur Ingram 60		Parmenter <i>versus</i> Cressley 25	
Holdwich & Ux. <i>versus</i> Chafe 41		Paradine <i>versus</i> Jane 26	
I		Petchet <i>versus</i> Wolston 47	
J Ohnson <i>versus</i> Barrot 10		Pierfon <i>versus</i> Dawson 32	
Johnson <i>versus</i> Rawle 90		Powel <i>versus</i> Waterhouse 5	
K		Price <i>versus</i> Vaughan 45	
K Enrig <i>versus</i> Egglestone 93		Prigs <i>Cafe</i> 78	
King <i>versus</i> Somerland 19		Prugnel <i>versus</i> Gofs 67	
Kinallon & Spencer <i>versus</i> Jones 85		R	
L		D Ominus Rex <i>versus</i> Holland 14	
L Awrence <i>versus</i> Kete 54		Rose <i>versus</i> Spark 51	
Lawrence <i>versus</i> King 29		Royston <i>versus</i> Cordry 42	
Leech <i>versus</i> Davis 58		Shaw	
Loder <i>versus</i> Hampshire 63			
Lodge <i>versus</i> Weeden 22			

The Table.

S		U	
S Haw <i>versus</i> Huntly	21	U Dal <i>versus</i> Udal	81
Simonds <i>Case</i>	49	Vincent <i>versus</i> Furly	9
Sims <i>versus</i> Gregory, &c.	22	<hr/>	
Smalman <i>versus</i> Hutchinson	95	<i>W</i>	
Southcote <i>versus</i> Southcote	80	<hr/>	
Spatchurst <i>versus</i> Sir Martin Minus	57	W Ard <i>versus</i> Prin	78
Stoughton <i>versus</i> Day	10	Waters <i>Case</i>	8
<hr/>		Wheeler <i>versus</i> Wallroon	28
		Whittaker <i>versus</i> Hilladel	11
		Wright <i>versus</i> Pindar	18
		<hr/>	
T		r	
T Anner <i>versus</i> Lawrence	24	Y Earworth <i>versus</i> Pierce	32
Taylor <i>versus</i> Usherwood	8	<hr/>	

THE

THE
Names of the Learned Council that Argued the
matter in Law contained in this BOOK.

HALES:

TWISDEN:

WINDHAM:

MAYNARD:

MONTAGUE:

LATCH:

BOREMAN:

TARD:

GREEN:

Mich. 22 Car. Banco Regis.

Ann Bafeild *Administratrix versus* Collard.
22 Car. Rot. 673.

IN an Action upon the Case the Plaintiff declares, That upon communication of a Marriage to be had between the Intestate's Daughter and the Defendant's Son, it was agreed, That the Intestate should give the Son 50 li. with his Daughter, and that if the Daughter survived the Son, the Defendant should pay her 100 li. after his death, and mutual promises were made between the Intestate and Defendant to perform the Agreement, and shews that the Marriage was had, and that the Intestate paid the 50 li. and died, and that the Son died, and assigns breach in the Defendant's non-payment in retardat' administrat' &c. and upon non assumpsit it was found for the Plaintiff: And Maynard moved that the action ought to have been brought by the Daughter, for it has been adjudged that it lieth for her upon such a promise, and so the Defendant should otherwise be doubly charged; but upon good debate, judgment was given for the Plaintiff, for the consideration moved from the Intestate, and the promise was made to him, yet it was agreed that it might be brought by the Daughter; 27 H. 8. 24. Tatam's Case Where upon promise to the Wife that if the Husband would release Tatam out of execution, the Defendant would pay the debt; the Husband alone brought the action, and layed the promise made to himself, and recovered.

Assumpsit for mutual promise to pay A. 100 li. A. may have the Action, so may the Party or his Administrator.

Husband brings the Action in his own name upon promise to the Wife and lays the promise made to himself.

And the Court, in retardat' administrat' was good enough, though the money was to be paid to the Daughter, because it was a duty to the Intestate, and the damages recovered will be assets, however it was but form, and well enough; and Roll said that the very point in the principal Case was adjudged Pasc. 5 Jac. Between Ashdall and Bernard: And Bacon, cited 44 Eliz. Rippon and Norton's Case, where the Defendant's Son made an assault upon the Plaintiff and his Father, and the Father was going to a Justice of Peace to complain, and have a Warrant for him to bind him to the Peace; the Defendant in consideration that he would forbear to complain, promised the

Promise to the Father that, &c. the Son brings the Action.

Plaintiff that his Son should not assault him any more, and up^{on} forbearance and a new Assault the Plaintiff brought his Action, and recovered; for the consideration moved from the Son, who should have ben secured from Assaults, if the Complainant had proceeded; and it was resolved here that there needed no notice of the death of the Son.

Etheringham versus Etheringham.

A Will torn in pieces with Rats, if a Stranger by laying the pieces together could make the devise appear, good: if gnawn before the death, against the Will.

IN an Eject['] firm['] upon a tryal at the Bar the Evidence was that one Warner by his Will in writing devised the Lands in question to Henry Etheringham, and the Heirs males of his body, and bailed the Writing to the Scrivener to keep, and four years after died, and about a fortnight after his death this Writing was found in the Scrivener's Study, gnawn all to pieces with Rats, yet he with the help of the pieces, and of his memory and other Witnesses, caused it to be proved in the Ecclesiastical Court; and now the Court demanded of the Witnesses, whether a Stranger that knew not the Contents of the Will before, by joining of the pieces together could tell that the devise of the Lands in question was to Etheringham, and the Heirs males of his body; for they did agree that if this clause could be made out, though by joining of the pieces, it were a good Will, for all that. But the Witnesses said that a Stranger could not make out that clause. Whereupon the Court directed the Jury, that if they found that the Will was gnawn before the death of the Devisor, then 'twas for the Plaintiff; if after, for the Defendant; and the Jury found for the Defendant in favour of the Will.

Markham versus Adamson.

Words, I accuse you to be a Witch, &c.

IN Slander, The Defendant said to the Plaintiff, I accuse you to be a Witch; and the next day said, I desire to have you searched; the Plaintiff asked, why would you have me searched? the Defendant said, because I accuse you to be a Witch; and

and after a Verdict for the Plaintiff, judgment was given against him, because the words did not import an Accusation of any offence within the Statute. But it was agreed that if the Plaintiff had been accused of bewitching a Man or a Beast, though this were not Felony by the Statute, the Action would have lain, and so hath it been adjudged.

Newman *versus* Zachary.

Action sur le Case The Plaintiff declares that the Defendant was his Shepherd, and that two of his Sheep did stray, one of which being found again, the Defendant affirmed to be the Plaintiff's, whereupon the Plaintiff paid for the feeding of it, and caused it to be shorn and marked with his own Mark; and yet afterwards the Defendant malitiose machinans to disgrace the Plaintiff, and knowing the said Sheep to be the Plaintiff's, falso & fraudulenter affirmavit to the Bailiff of the Manor that had waifs and strays belonging to it, that this Sheep was an Estray: whereupon the Bailiff seized it to his damage, &c. And after a Verdict for the Plaintiff Latch moved that there was no cause of Action, for there is no breach of trust in the Defendant as Shepherd, and his words cannot endamage the Plaintiff, for he shall have his remedy against the Bailiff of the Manor that seized the Sheep wrongfully. But it was adjudged that the Action would lie, because the Defendant by his false practice hath created a trouble, disgrace and damage to the Plaintiff; and though the Plaintiff have cause of Action against the Bailiff, yet this will not take off his Action against the Defendant in respect of the trouble and charge that he must undergoe in the recovery against the Bailiff, and Hales said that if one slander my Title, whereby I am wrongfully disturbed in my Possession, though I have remedy against the Trespasser, I shall have an Action against him that caused the disturbance.

Action sur le Case for his false practice creating trouble, &c. to the Plaintiff.

Upon slandering a Title though the party hath remedy vers. Trespasser, yet Action lies against him that caused the disturbance.

Sir Thomas Bowe's Case.

If Lessee for years hold over and pay his Rent quarterly, that makes a Tenant at will.

21 H. 7. 38 E.

14 H. 8. 11. f.

Dyer 62 a. 173.

Ten. at will begins a new Quarter over shall pay the Rent
Inst. 56. 69.
13 H. 8. 16. a.
Kel. 65. 6.

IN Debt for Rent upon a Lease at Will of Houses in London, upon a Trial at the Bar touching the Title of Sir T. Bowes, it was agreed and given in charge to the Jury by Roll, that if Tenant for years holds over his term, and continue to pay his Rent quarterly as before, that this payment and acceptance of the Rent amounts to a Lease at Will.

2. That if Tenant at Will rendering Rent quarterly begins a new Quarter, and voluntarily determines the Will before the Quarter ended, yet he shall pay the Rent for that Quarter.

Evely *versus* Livermore H. 17 Car. Rot. 1409.

Stat. 3 Jac. that does not extend to a special Action upon his promise and to give a Ticket of his charges.

IN an Assumpsit the Plaintiff declares that the Defendant retained him as his Attorney to follow his Causes in the King's Bench, Chancery, and Court of Request, and gave him so much in hand to defray his charges, and promised to pay him what more he should lay out, and alledges that he layed out 10 li. more then he received for Fees of Counsel and other charges in the Defendants Suits, which the Defendant hath not paid, &c. The Defendant pleads the Statute 3 Jac. 7. that the Plaintiff did not give a Ticket to him of his charges, &c. and after demurrer it was adjudged for the Plaintiff, for the Statute doth not extend to a special Action upon a promise, and so it was adjudged in Dobbins his Case.

Farrer *versus* Bates P. 22 Car. Rot.

Arbitrement, Debt and other Controversies lie in Arbitrement though Debt solely does not.

IN an Indebitatus Assumpsit for 9 li. upon an Infimul computaverunt, the Defendant pleaded a submission of all actions and controversies to Arbitrement, and that the Arbitrators awarded

awarded that the Defendant should pay the Plaintiff 4 li. in satisfaction of all Accounts, and upon issue quod non se submis-
erunt Arbitrio, it was found for the Defendant, and upon
motion in arrest of Judgment it was agreed, that though Debt
it self doth not lie in Arbitrament, yet that and other Contro-
versies doth. 10 H. 7. 4. & 4 H. 6. 27. But it was likewise a-
greed that where Arbitrament is no plea in Debt, it is no plea
in an Assumpsit upon the Debt.

Where Arbitre-
ment is no plea
in Debt, it is no
plea in an As-
sumpsit upon the
Debt.

2. It was resolved that the Arbitrament did not reach the
thing demanded, for that was only of all Accounts, and this is
a duty upon the Account, and so the Defendant could have no
Judgment: then it was moved to have a Repleader, but denied
by Roll being then sole present.

Where it does
not reach the
thing demanded.

Repleader deni-
ed.

Hil. 22 Car. Banco Regis.

Powel *versus* Waterhouse. T. 22 Car. Rot.

In an Assumpsit the Plaintiff declares that the Defendant in
consideration of a Marriage, &c. Inter al' promisit de payer
tant, & puis Verdict pro Querent' Judgment fuit done vers. luy,
because he ought to set forth the whole promise which is entire.

Promise inter
alia not good,
ought to set
forth the whole
Promise.

Hinacre *versus* Lemon. M. 22 Car. Rot.

Slander. The Defendant said of the Plaintiff she caused
Mr. Langly's Servant to steal and purloin 30
received them and sold them, which was the cause why his Master
broke, and upon a Verdict and Judgment in the Common
Bench, in a Writ of Error the Judgment was affirmed; because
she is charged with procuring of Felony, and receiving stolen
Goods.

Words charged
with procuring
Felony, good.

Haines *versus* Finch.

Debt upon a promise for bringing up Children, good, without saying they were the Plaintiff's.

Debt upon a promise of money to marry a poor Virgin.

Servant retain'd an Attorney for his Master, and promiseshim his Fees: Debt lies against the Servant.

AN Executor brought an Action of Debt upon a promise made with the Testator, for bringing up of Children, and Teaching; and after a Verdict for the Plaintiff upon nil debet pleaded, it was moved that Debt would not lie in the Case, because it was not layed that they were the Plaintiff's Children. But the opinion of the Court was for the Plaintiff, for Debt will lie upon a promise made by a stranger, as in N.B. 122. k. If one promiseth money to another for marrying a poor Virgin, Debt lieth; but the parties agreed, and so no Judgment was given: And Roll said that in Trevilian's Case, where a Servant retained an Attorney for his Master, and promised he should have his Fees, an Action of Debt was brought thereupon by the Attorney against the Servant in C. B. and the Plaintiff recovered: but upon Error in this Court a rule was given for the reversal of the Judgment, notwithstanding the like President shewn in Bradford's Case: but he said that the Judgment was not reversed upon the Roll, and his opinion was that the Judgment was good.

Edwards *versus* French. T. 22 Car. Rot. 675.

Slander, where by he lost his Marriage: And no agreement of Marriage or mutual Love alledged, and the words were spoken only in the innuendo, yet good.

SLander. The Plaintiff declares that whereas there was a Communication of Marriage between the Plaintiff and one Mary Hicks, who was worth 300 li. and that she deferred Marriage with the Plaintiff, q.d. that verisimile fuit, that they should be Married: the Defendant in the hearing of divers persons said Mary Hicks is Mr. Edwards his Whore, innuendo the Plaintiff; whereupon Mary Hicks was refused to marry the Plaintiff: And after a Verdict for the Plaintiff it was moved, that there was no agreement of Marriage, nor mutual love alledged between the Plaintiff and M. H. 2. That the words were not alledged to be spoken of the Plaintiff but only in the innuendo: yet upon good debate Judgment was given for the Plaintiff.

Osborne *versus* Brooke, Trin. 22 Car. Rot. 677.

SLander. Captain Osborne is forsworn, and his Oath appears upon Record. The Defendant as to the first words pleads not guilty; and as to the latter, justifies that he was forsworn in finding of an indictment of Forcible Entry, and upon de injuria sua propria, as to the justification both issues were found for the Plaintiff: And upon motion of Latch in arrest of judgment. First, if the Words themselves were actionable. Secondly, if the Justification made them good and actionable; and upon great debate, judgment was given for the Plaintiff in both points. First, the Court did take the words, being spoken together, to be the same as if he had said, he is forsworn upon Record, which is as much as to call him perjured. Secondly, his justification hath explained his meaning in them to be of perjury: And Tuke and Condie's Case was cited for this, where the Defendant in an Action brought for saying, You are forsworn, justified that he was forsworn in an indictment of Battery; and the issue upon the justification being found for the Plaintiff, he had judgment in Common Bank, which was afterwards affirmed in this Court, and now allowed for good Law by both the Judges; yet two Objections were made by Latch against this judgment. First, that the Declaration of it self being insufficient in substance could not be made good by the Defendant's bar. Secondly, that the ground of the Action is the disgrace that the Plaintiff incurs before the Auditors; now they must understand the words according to the common acceptation as they were spoken, and not in the sense wherein the Defendant justifies the speaking of them, and he cited a Case 21 Jac. between Wheeler and Abbot, where in Slander for saying, Thou hast stolen my Piece, innuend' a Gun, the Defendant justified that the Plaintiff did steal his Gun, and though the Justification which shewed the Defendant's meaning to be of a Gun, was found against him, and Piece was a word of an incertain signification, which could not be explained by the Innuendo, Judgment was given against the Plaintiff for the Reasons aforesaid.

Slander. Is forsworn, and his Oath appears upon Record. Act' gift.

Justification, explains the Parties meaning to be of perjury.

Pasc. 23 Car. Banco Regis.

Water's Case.

Ten in common
makes a Wall
against the
house, to pre-
vent the others
getting in, no
disseisin.

IN an Assise of a House in Westminster, upon null' tort, &c. pleaded, and a tryal at the Bar, the Evidence was, that there were two Tenants in common of the House, and one of them nailed up the Doors, and made up a Wall against the House to prevent the others getting into the House, and this was resolved no Disseisin, and so the Jury were discharged. But the point in Law would have been that a Tradesman purchased Lands in fee to himself and his Wife, and after became Bankrupt, &c. whether the Commissioners had power to sell so as to bar the Wife.

Taylor *versus* Usherwood. Hill. 18 Car. Rot. 87.

Demise.

IN an eject' firmæ upon a special Verdict the Case was, That one devised Land to one Elizabeth for her life; and after her death to the eldest Heir male of her body, and to the Heirs males of such Heir male, so that he be of twenty four years of age at the time of the death of Elizabeth, and if he be not of twenty four years of age at that time, then that the Husband of Elizabeth shall hold them till he comes to that age, and the profits to be disposed among the younger Children; Elizabeth dieth, her Heir male within the age of twenty four years, and after he attained to that age, and entred, and demised to the Defendant. And Hales argued for the Defendant, That if the demise had rested in the Words (so that he be of twenty four years of age at the time of the death of Elizabeth) it would have been a contingent limitation upon the being of that age at that time, but now that by a mean disposal of the Profits he fills up that space of time, it appears he did not mean to make that limitation a contingency to the Remainder, but upon that supposal to provide for the younger Children; and the Case was adjourned.

Where words
make a contin-
gency by the
intent of the
party.

Pasc.

Pasc. 23 Car. Banco Regis.

Needler *versus* Guest. Trin. 17 Car. Rot. 1324.

IN an Action of Covenant, The Plaintiff declares that the Defendant being an Attorney covenanted to take the Plaintiff for his Clerk, and to allow him 2 s. for every Quire of Paper that he should Copy out, and 1 d. for every Sheet that he should engross, and so much for such and such things, and all usual fees, and among other breaches he alledged, that he copied out a Bill containing four Quires and three Sheets, for which 8 s. 3 d. was due to him, which the Defendant hath not paid. And upon a Verdict and Judgment for the Plaintiff in C. B. it was moved for error that there could be no apportionment in this Case, for the Covenant was to allow him 2 s. for copying a Quire, but not pro rata. And for this cause upon good debate the Judgment was reversed; but it was holden that if he had averred 3 d. to be the usual fee for copying three Sheets of Paper, he might have helped himself upon that Clause.

Covenant for 2 s. for copying every Quire of Paper. Breach that he copied four Quire and three Sheets, for which 8 s. 3 d. was due. And that there could be no apportionment, for the Covenant was to allow him 2 s. a Quire, but not pro rata. If he had averred 3 d. to be the usual fees for copying three Sheets he might have helped himself.

Vincent *versus* Furfy. Hil. 22 Rot.

IN an Action of Trespass for entering into his House, and breaking duas Cistas, and for taking diversa genera apparatusum in Cista prædicta existent. and for beating his Servant per quod Servitium amisit; after a Verdict for the Plaintiff, upon motion in arrest of judgment it was agreed. First, that one may have a general Action of Trespass, and a special Action upon the Case in one Action. Secondly, that the words diversa genera apparatusum were too incertain of themselves, but being referred to a Chest wherein they lay, they were reduced to sufficient certainty; but because two Chests were mentioned before, and the Apparel was alledged to be in Cista prædicta in the singular number, so that it appears not in which they were, judgment was given against the Plaintiff.

Trespass.

Stoughton *versus* Day. Hil. 22 Car. Rot. 486.

Debt.

IN Debt upon a Bond with Condition; That whereas the Plaintiff is Sheriff of Surry, and hath made Cornelius Trapp his Bailiff of the Hundred of Brixto, if he should execute his Office, &c. and make true returns of all Warrants directed to him, then, &c. The Defendant upon Oyer pleads particularly performance to all; the Plaintiff replies, that process was directed to him to levy Issues upon J. S. and that he made his Warrant to Trapp to execute the same, which Warrant he did not return: and upon a demurrer Judgment was given against the Plaintiff, because he did not shew that the Issues were to be levied within the Hundred of Brixto; for it was resolved, that though the words of the Condition were general to make return of all Warrants directed to him, yet it was to be understood of such only as were to be executed within the Hundred of which he was made Bailiff.

Capel *versus* Allen. Hil. 22 Car. Rot. 639.

Debt.

IN Debt upon a Bond with Condition to perform an Award, the Plaintiff upon nullum arbitrium pleaded by the Defendant, sets forth that the Arbitrators did award de & supra præmissis modo & forma sequenti, viz. That the Defendant should pay so much to the Plaintiff, and the Plaintiff should pay for the Writings of the award: and it was adjudged a void Award, because but of one side, for it did not appear that the other party was bound to pay for the Writings, which was the only recompence for the Defendant. And this also is matter subsequent to the submission, and so cannot be intended a good recompence.

Johnson *versus* Barret, & auters.

Trespass.

IN an Action of Trespass for carrying away Soil and Timber, &c. Upon Trial at the Bar the Question arose upon a Key that was erected in Yarmouth, and destroyed by the Bailiffs and Burgesses of the Town; and Roll said, that if it were erected between the high Water-mark and low Water-mark then
it

it belonged to him that had the Land adjoyning. But Hale did earnestly affirm the contrary ; viz. that it belonged to the King of common right. But it was clearly agræd, that if it were erected beneath the low Water-mark, then it belonged to the King. It was likewise agræd, that an Intruder upon the King's possession might have an Action of Trespass against a Stranger ; but he could not make a Lease, whereupon the Lessee might maintain an Ejectione firmæ.

Whitacre *versus* Hillidell. H. 22 Car. Rot. 1318.

SLander. Margaret Whitacre is a Thief and stole my Wood, Slander.
 and I will have her put in Bridewell ; and upon motion in an arrest of Judgment after Verdict, it was agræd by Bacon and Roll that those words, she is a Thief and stole my Wood, of themselves were actionable, and Cases cited accordingly. But Bacon held that the latter words qualified the former, for the Statute 43 Eliz. cap. 7. enacteth that persons that steal Wood growing, which is not Felony, shall be whipped if they make not satisfaction : now Bridewell is known to be a place where such penalties are inflicted, so that upon all the words it shall be intended an accusation of such an offence, the penalty whereof is whipping, and not of Felony. But Roll contra totis viribus, because the words, she is a Thief, are single and the other accumulative, being brought in by the word And : but if it had been for she stole, &c. then they are explanatory. And this difference hath been alwaies taken in this course. But Bacon denied the difference, and cited Clerke and Gilbert's Case, Hob. 331. thou art a Thief, and hast stolen twenty load of my Furzis, and adjudged not actionable, and no difference allowed between and and for, but Roll flatly denied that Case to be Law. 2. To accuse one of petit Larceny will bear action, and for that the offender shall be whipped ; so that might be his meaning ; and he said that where the first words are a plain and direct Slander, the subsequent words that should take of their effect, ought to carry in them a very strong Intendment that they were spoken in a sense not actionable ; for it is very unreasonable that one should slander another in general words, and then mitigate them by other words of a doubtful interpretation, & sic pendet, &c.

Sir John Chichester's Case.

Indictment.

SIR J. C. was indicted of Manslaughter; and tried at the Bar, and evidence was that he and his Man were playing at Foils, and the Chase of Sir John's Scabbard fell off unknown to him upon a thrust, so that the Rapier went into his man's Belly, and killed him. And the Court directed the Jury, that forasmuch as such acts are not warranted by Law, the parties that use them ought at their own peril to prevent the mischief that may ensue, for consent will not change the Case; and therefore though there were no intention of doing mischief, yet the thrust being voluntary, was an assault in Law, and death ensuing, the offence was Manslaughter; yet the Jury found it Chancemedly, but the Court would not accept the Verdict, but charged them if they varied from the Indictment to find it specially. And Bacon said he had known a Jury bound over to the Star-chamber upon the like Cause, whereupon they found him guilty, and day was given him to procure his Pardon, &c.

Pasch. 23 Car. Banco Regis.

Andrews & Harborn. Mich. 22 Car. Rot. 483.

Scire facias.

Scire facias was brought in Middlesex upon a Recognizance taken before Justice Reeve at his Chamber at Serjeants Inn in London, and Judgment given in C. B. and upon a Writ of Error brought in this Court, it was moved, that it ought to have been brought in London where the Recognizance was taken; for though the Scire facias must be grounded upon a Record, and the Recognizance be no Record till it be entered, yet after it is entered, it becomes a Record by relation from the time of the Recognizance. And Hall and Winkfield's Case, Hob. 195. was cited, and the case was much debated: and Roll (Bacon absent) said that the most ancient and proper course was to bring the Scire facias where the Recognizance was taken; but he shewed in his hand a Certificate of all the Prothonotaries of the C. B. that of latter times they have allowed it the one way or the other; and so the Judgment was affirmed. And Pasch. 20 Jac. Rot. 210. B. R. between Polting and Fairebank the like Judgment was given

given upon a Recognizance taken before one of the Judges of this Court in London, and a Scire facias brought in Middlesex; but it was said that the usual Entry in this Court is to express before what Judge it was taken, but no place where; and then it might be brought in Middlesex without question.

Hilton and Plater. Hil. 21 Car. Rot. 30.

SLander. The Plaintiff declares, That whereas he was At- Slander.
torney, &c. the Defendant said to him, You are a Knave, you were Attorney for my Mother, and set my Mother against my Husband, and made him spend an 100 li. and such Knaves as you have made my Husband spend all his Estate. And after a Verdict for the Plaintiff, it was moved the last Term in arrest of Judgment, because no communication is laid of his Profession, whereby the word Knave may be applied to that, and the other words do not import any scandal of him in his Profession; for he might lawfully set the Defendants Mother against her Husband, as if there were cause of Action against him; whereupon Judgment was stayed. And now this Term it was moved again; And Bacon was of opinion against the Plaintiff for the reasons aforesaid: But Roll, contra, because the subsequent words declare, that the word Knave was intended of him in his Profession, and therefore need no colloquium of his Profession. And afterwards the same Term ex assensu Baron' (mutata opinione) Judgment was given for the Plaintiff.

Trin. 23 Car. Banco Regis.

Paine *versus* Shelthroppe. Hil. 22 Car. Rot. 740.

IN an Action of Debt upon a Bond with Condition, That if ^{Debt.}
the Defendant and his Wife should appear such a day at the Palace Court, &c. The Defendant upon Oyer of the Condition, pleads that he himself did appear at the day prout apparet per record'; and that he was not married at the time of the Obligation, nor ever after: And it was adjudged to be no good plea, because he is estopped to deny that he had a Wife. Otherwise when the Condition is general; as to enfeoffe one of all his
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his Lands in Dale; there he may say he had no Lands there.
Vide Dyer 50. f. 196. d. 18 E. 4. 4. f. 21 E. 4. 54. g. l. 2. 33. h.

Dominus Rex versus Holland.

AN Office was found and returned in the Chancery, That a Coppelhold in Islington was 14 Car. granted to one John Holland and his Heirs at the will of the Lord, &c. in trust for one Margaret Taylor (who was an Alien) and her Heirs; and that the profits were disposed according to the trust, and that after M. T. died: and this was by virtue of a Commission to enquire what Lands, &c. M. T. had, and the Commissioners seised the Land; whereupon Holland came and shewed his Title, and traversed the seisin in trust for M. T. And Issue being joyned, it was found for the King; and note the Venire facias was awarded in the Chancery returnable in this Court, and the Record sent hither, (for they try no Issue there.) And exception was taken to the Writ because it was quorum quilibet habet 4. libratas terræ, and according to Stat. 27 El. cap. 6. which extends only to this Court C. B. Exchequer and Justices of Assize: to which it was answered, That forasmuch as it is returnable in this Court, it is well enough within the Statute; but that Answer was not allowed: but because this Clause was added by the Statute of 35 H. 8. cap. 7. which was in the affirmative, that the Writ should continue quorum quilibet habet 2. libratas terræ. And the Statute 27 El. adds that it shall be 4. libratas in such Courts, but no negative words in either Statute; therefore it is but abundans cautela, and makes not the Writ vicious. And Roll said that it was so adjudged Mich. 21 Jac. between Philpot and Feilder. The Questions in Law were, 1. If the King should have the trust: 2. If by virtue of that he might seise the Land: 3. If the Case differ'd, because Coppelhold. And it was argued the last Term by Mountague for Holland, and Hale for the King; and this Term by Maynard for Holland, and Twissden for the King.

1. That Uses at the Common Law were things partly in action, so that they were not given to the King by general words of Hereditaments in Statutes, as is agreed in the Parquers of Winchester's Case. And they consisted in privacy, and therefore could not be transferred by act in Law, as by elcheat for Attainder, &c. And the preamble of the Statute of 27 H. 8. which

which reduces the possession to the Use, recites that by conveyances to Use, the King lost his escheats and purchases of Aliens, &c. l. 1. 124. a.

Now Trusts being of the same nature at this day, they are ruled according as Uses were at the Common Law; and therefore if a Woman conveys a term in Trust for her self, and takes Husband and dies, he shall not have the Trust by survivorship, but the Administrators of the Wife should have it. 4. Inst. 87. a. Witham's Case. (But Roll said that it hath been since resolved that the Husband shall have it in that case.) And Mainard said that the Alien himself had no remedy in equity for the Use at Common Law, nor for a Trust at this day; for he could not compell the Feoffees to execute it.

2. If the King should have the Trust yet he cannot seise the Land by Law, for the Alien himself had not that power; his remedy, if he should have any, was only in the Chancery.

3. The Land it self being Copyhold, the King cannot have it.
1. Because it is not transferrable by act in Law without the concurrence of the Lord, for the prejudice that may accrue to him in losing his Fine, &c. 2. Because the King cannot perform the services incident to the Tenure; and yet in default thereof, the L. could not take advantage of the forfeiture as against the King.

3. It would be an injury to strangers that should have right to the Copyhold; for the King is not to be impleaded in the Lords Court where only remedy is to be taken.

4. The Estate is too base for the King to hold.

On the contrary it was said,

1. That the King should have had a Use limited to an Alien at the Common Law, and by the same reason that he was to have the Land purchased by Aliens, viz. That the Realm should not be impoverished by strangers; and Uses at the Common Law were not properly things in action, but Inheritances descendible by the rules of the Common Law, and would have passed by grant or devise by the name of Hereditaments, as Hale said. And he said that the preamble of the Statute of 27 H. 8. is not to be intended as though the King should not have remedy for the profits when the Use was discovered, but that the Lands were so craftily conveyed that the Use could not be discovered. Now the case is the same of a Trust.

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2. The King by virtue of this Trust may seize the Land; for though the profits only are given him by the Trust, yet he hath not any direct means to be satisfied of those profits unless he may seize the Land. And therefore 5 H. 5. 3. where a Manor with an advowson appendant was granted to the use of one who was after outlawed, and upon an avoidance the King brought a Quare impedit, and had a Writ to the Bishop. And Hales said that 19 Jac. in Sir John Dack's Case, in Scaccar' to whom the King granted a term to the use of the Lord, who was attainted of Felony: upon great deliberation with all the Judges it was resolved, and accordingly decreed, that the Trust should be forfeited to the King, and the interest of Sir John also.

3. Now that the Estate of the Copyholder is fixed by the Custome, there is the same reason for that as for any other Inheritance. And this Term the Court took an exception to the Commission, which was only to enquire what Lands, &c. the Alien had, but no Capias in manus in it; and therefore it was resolved that the seizure was unduly made, and therefore they did not openly declare their opinion upon the matter in Law. But Bacon said that an Alien at the Common Law could not compell the Feoffees to execute an Use: And Roll said, that though the King should have the Use, yet he could not seize the Land it self by Law, but by equity he might have a Decree for the Land: and so was Sir John Dack's Case. And the Court doubted what Judgment should be given, the Verdict being found for the King. And the rule was, that cesset intratio judicii, &c. for they held that they could not give any Judgment, but afterward Termino Paschæ 24 Car. the opinion of the Court being changed, they directed the Case should be argued. And Hale argued for the King, that no Judgment could be given against him, because the Record of the Inquisition is still remaining in the Chancery; and this Court hath no power to proceed, but only to trial of the Issue, and upon the Verdict, for the very Record as to that is in this Court (and yet he said that the Record after the Trial hath been remanded into the Chancery, and Judgment given there) but the tenour only of the Inquisition is here, as appears by the Entry, &c. but if it had been brought in per manus proprias of the Keeper of the Great Seal, then the whole Record had been here, and so Judgment should have been given upon the whole Record. And he took this difference, that when the tenour of a Record being removed, the Court where the Original Record resides cannot proceed, then the Court where the tenour is may proceed upon the
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the tenour. And therefore if the tenour of a Fine be certified upon a Certiorari out of the Tower or Treasury into the Chancery, and sent into the Common Pleas by Mittimus, Execution may be awarded there upon the tenour 39 H. 6. 4. a. So if the tenour of a Judgment in a Writ of Annuity be certified out of the rescript in the Common Pleas into the Chancery, and sent thither by Mittimus they may award execution there upon the tenour 34 H. 6. 2. d. because in those cases there are no other Justices that can proceed upon the Record it self, but where the Judges where the very Record resides may proceed thereupon, notwithstanding any tenour certified in such cases, there can be no proceeding upon the tenour: As if the tenour of a Judgment in ancient demesne be certified in Chancery, and sent by Mittimus into the Common Pleas, no Scire facias lieth thereupon; because the Court of Ancient Demesne may still proceed to execution upon the Record it self. 39 H. 6. 3. h. &c. So in our case the Chancery may still proceed to seisure upon the Inquisition, affirming it to be good. 14 E. 4. 7. a. And therefore this Court cannot proceed upon the tenour of it, for thence might ensue a clashing of the Courts; the one affirming it, and the other quashing it: and for these reasons he prayed that the former rule might stand. But it was answered by Maynard, and resolved by the Court, that Judgment ought to be given against the King, because the whole Record is virtually here, otherwise they should be bound up to the Clerk, so that Judgment should be given according to that, though it appear upon the whole Record that the King had no Title. And both the Judges denied that the Chancery could proceed upon the Inquisition, now that the same was sent hither upon the Traverse, but that the Judgment in this Court would utterly subvert the Inquisition: And therefore Judgment was given quod manus Domini Regis amoveantur.

Shalmer versus Slingsby. Hil. 22 Car. Rot. 1036.

IN an Action of Debt upon a Bond the Defendant pleaded, ^{Debt.} That the Bond was made in another County than where it is alledged in the Declaration; and prayed that the Attorneys might be examined thereupon by force of the Statute of 6 R. 2. cap. 2. And the Plaintiff demurred, as if it had been a plea in bar to the Action: And the Defendant joyned in demurrer, and concluded quod ab actione præcludatur. And it was resolved that the plea was naught, and not warranted by the Statute,

tute, which provides only that the Original shall not be laid in one County; and the Declaration upon a Bond made in another County; and if so, the Writ shall abate; but this course of pleading hath been alwaies disallowed. Vide 3 H. 6. 35.

2. Because the demurrer was joined as to the Action, therefore Judgment was given quod recuperet, &c.

Wright *versus* Paul Pindar. Pasc. 22 Car. Rot. 440.

Trover.

IN a Trover and Conversion brought by an Administrator; upon not guilty pleaded, the Defendant upon the evidence confesses, that he did convert them to his own use; but further saith, that the Intestate was indebted to the King, and that 18. May, 14 Car. it was found by Inquisition, that he died possessed of the Goods in question; which being returned, a venditioni exponas was awarded to the Sheriff, who by virtue thereof sold them to the Defendant. And to prove this the Defendant shewed the Warrant of the Treasurer, and the Office-Book in the Exchequer, and the Entry of the Inquisition, and the venditioni exponas in the Clerk's Book; to which the Plaintiff saith, that the matter alledged is not sufficient to prove the Defendant not guilty; and that there was no such Writ of venditioni exponas. And the Defendant saith, that the matter is sufficient, and that there was such a Writ. And it was resolved, that he that demurs upon the Evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the Court. And if the matter of fact be uncertainly alledged, or that it be doubtfull whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alledges this matter cannot join in Demurrer with him, but ought to pray the judgment of the Court, that he may not be admitted to his Demurer, unless he will confess the matter of fact to be true. And for that the Defendant did not so in this case, both parties have misbehaved themselves, and the Court cannot proceed to Judgment. But it was clearly agreed, that upon Evidence the Court for reasonable cause, at their discretion, may permit any matter to be shewn to prove a Record. Com. 411. b. And the opinion of the Court was, that an alias Venire facias should be awarded, and not a Venire de novo, because no Verdict was given.

Trin.

Trin. 23 Car. Banco Regis.

King *versus* Somerland. Pasc. 23 Car. Rot. 146.

IN an Action of Debt for Rent, the Plaintiff declares upon a ^{Debt.} Lease for years made by a stranger, who bargained and sold the Reversion to the Plaintiff per indenturam debito modo irrotulat in curia Cancellariæ; and after a Verdict for the Plaintiff, upon nil debet, pleaded, it was moved in arrest of Judgment, that he had not alledged the incolment to be within six months, nor secundum formam Statuti: And though it were said to be debito modo, that would not help, because it might be so at the Common Law, and the Verdict could not make the Declaration good for want of a convenient certainty for the foundation: and therefore upon great deliberation Judgment was given against the Plaintiff.

Coleman *versus* Painter. Trin. 23 Car. Rot.

IN an Action of Debt upon a Bond with condition to perform ^{Debt.} Covenants, one of which was, that the Plaintiff should not be interrupted in his possession of certain Lands by any person that had lawfull Title; and particularly, that he should not be interrupted by one Thomas Anthony, by virtue of any such Title; upon performance of Covenants pleaded, the Plaintiff replies, that 1. Novemb. 20 Car. the Defendant made a Lease for years to the Plaintiff of the Lands mentioned in the Dēd, and that the 3. of the same month the Plaintiff entred, and that before this time, viz. 17. Augusti 20 Car. the Defendant made a Lease to the said Tho. Anthony for a term of years yet to come, who 20. Aug. 20 Car. entred into the Land, &c. the Defendant pleaded, that the said Lease made to T. A. was with condition of reentry for non-payment of Rent, and that before the Lease made to the Plaintiff the Rent was behind, & legitime demandat secundum formam indenturæ; And upon non-payment he re-entred and made a Lease to the Plaintiff: And upon a general demurer it was resolved, that the Demand was insufficiently alledged; for he ought to set forth certainly when and where it was made, that it might appear to the Court to be legal; but for the flaw in the Plaintiff's replication, because he alledged

his Entry after the Lease made to T. A. so that it doth not appear that he was interrupted by him : the opinion of the Court was against the Plaintiff, but the next Term, by leave of the Court, he discontinued his Action.

Brown versus Evering. Hil. 21 Car. Rot. 354.

Debt.

IN an Action of Debt for Rent, after a Verdict and Judgment for the Plaintiff in the Common Pleas, upon a Writ of Error brought, and Diminution alledged, it appeared, that the Issue was joyned Pasc. 21 Car. And the Venire facias certified to be in placito prædicto inter partes prædictas hoc testis, Pasc. 20 Car. And this was moved for Error; but it was adjudged to be holpen by the Statute of 8 El. cap. 14. as if there had been no such Writ, for it is impossible that this should be the Writ in that Action.

Long versus Bennet.

Assumpsit.

IN an Assumpsit the Plaintiff declares, That in consideration that he had sold to the Defendant unam acram ligni, he promised to pay him 8 li. And after Verdict for him, upon non Assumpsit, it was moved, that the Declaration was uncertain, because it doth not appear whether the Soil it self, or the Wood only were sold: but after much debate the Plaintiff had his Judgment. Vide 17 E. 4. 1. d.

Frier versus Prentice. Pasc. 23 Car. Rot. 416.

Assumpsit.

IN an Assumpsit the Plaintiff declares, That the Defendant in consideration that the Plaintiff would permit J. S. to enjoy certain Lands, &c. promised to pay to the Plaintiff 15 li. annuatim pro quolibet anno during four years, if J. S. should live so long; and after the first year the Plaintiff brought his Action, and upon non Assumpsit had a Verdict and Judgment, though it was not averred that J. S. lived so long, for the Action lieth after the first year, Si being a limitation subsequent.

Shaw

Shaw *versus* Huntly. Trin. 21 Car. Rot. 321.

IN Debt against an Executor; upon plene administravit pleaded, ^{Debt.} and Issue thereupon, the Jury found that the Testator devised that his Executors should sell certain Lands.

Mich. 23 Car. Banco Regis.

Blackwell *versus* Ashton. Hil. 22 Car. Rot. 636.

A Scire facias was brought against three Bailles upon a Re- ^{Scire facias.} cognizance acknowledged by them and the principal jointly and severally; and upon a demurrer the Writ abated by good advice, because this being founded upon a Record, the Pl. ought to shew forth the cause of the variance from the Record, as that one was dead: but if an Action be brought upon Bond in the like case, there the Defendants ought to shew that it was made by them and others in full life, not named in the Writ, because the Court shall not intend that the Bond was sealed and delivered by all that are named in it; and therefore the Defendants cannot demur upon it though it be entered in hæc verba. And so it is if an action be brought upon a Recognizance taken before the Mayor and Recorder, &c. by the Statute of 23 H. 8. because there the parties must seal, and so hath it been adjudged. Dyer 227. e. 28 H. 6. 3. c. 36 H. 6. 16.

Fyner *versus* Jeffrys. Trin. 23 Car. Rot. 1599.

IN an Assumpsit the Plaintiff declares, That where one Ri- ^{Assumpsit.} chard Brand had assaulted and beaten the Plaintiff, &c. the Defendant in consideration that the Plaintiff would not prosecute the said R. B. &c. promised to pay him so much as the Plaintiff was damaged: and avers, that he hath not, nor yet doth, prosecute the said R. B. &c. And that he was damaged by reason of the same Battery in 30 li. which the Defendant, though such a time and place required, hath not paid; and upon non Assumpsit, and a Verdict for the Plaintiff, it was moved, that

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the Plaintiff hath not given the Defendant notice of what he was damaged in; but yet the Plaintiff had his Judgment, because the Defendant hath taken upon him to pay the damage that the Plaintiff sustained; which when the Plaintiff ascertains to him, and requires him to pay, the Defendant at his peril is bound to pay, if in truth he were so much damaged.

Lodge versus Weeden. Hil. 22 Car. Rot. 146.

IN an Action upon the Case for killing of Cattel infected de quodam morbo mortali Angl. the Murrain, and throwing their Entrails into the Plaintiff's field, per quod diversa averia of the Plaintiff's interierunt: after a Verdict for the Plaintiff, upon not guilty pleaded, it was moved to be too uncertain, because it doth not appear what, nor how many Beasts perished; but yet Judgment was given for the Plaintiff, because there needs not such certainty in an Action upon the Case, which is not brought for the Beasts themselves, or the value of them; but for damages sustained by their death through the Defendants means.

Sims versus Gregory and others. Trin. 23 Car. (or Pasch. 22 Car.) Rot. 247.

Trespass.

IN an Action of Trespass upon the Statute of Monopolies made anno 21 Jac. the Plaintiff sets forth the Statute, and that 13. Jul. 14 Car. proclamation was made by the King concerning Wines; by colour whereof the Defendants procured the Plaintiff to be imprisoned, and 200 Pipes of his Wine to be detained till he made Fine for them; and that afterward, viz. 15 Jul. 14 Car. another Proclamation was made, & colore hujus Proclamationis, postea, scil. 7. Jan. 20 Car. the Defendants caused the said Plaintiff to be taken and imprisoned, and that the Defendants not fearing the said Stat. postea scil. 14. Jul. ann. 20. supradicto tantas minas de imprisonamento corporis ipsius T. Sims adtunc & ibidem intulerunt quod idem Th. Sims per longum tempus, scil. à præd' 14. die Jul. anno 20. supradict. usque diem imperationis hujus billæ, scil. 14. diem Jul. 21 Car. circa negotia sua necessaria palam intendere non audebat, &c. contra pacem, &c. & contra formam Statuti, &c. The Defendant pleaded not guilty within

within six years, and it was found for the Plaintiff. And it was moved in an arrest of Judgment that the Declaration was repugnant; for the Imprisonment is laid to be 7. Jan. 20 Car. and then follows, that the Defendants postea scil. 14. Jul. 20 Car. tantas minas, &c. which is before the Imprisonment, for the King began his Reign 27. Martii, and the Jury have given damages with relation to the whole time, whereas the Declaration is nought as to a great part of it. And the Case being much debated, it was agreed,

1. That the Plaintiff in his Declaration need not answer the order of time wherein the Trespasses were done, but may alledge that which was done 7. Jan. before that which was done 14. Jul. But yet

2. It was resolved, that postea in the latter place must refer to the time immediately precedent, and cannot leap over that, and refer to the time wherein the Proclamation was made.

3. It was resolved, that the word postea in this case could not be void, and the time brought in by the Scilicet stand absolutely, because the word Scilicet is but explanatory, and for instance, and cannot contradict any thing that is precedent, Hob. 171. But if the word Scilicet had been out, and the time brought in by it had been alledged substantively, then the word Postea would have been void, being repugnant.

4. It was resolved, that the time brought in by the Scilicet was repugnant and void, and the Declaration stands as if no such time had been alledged: and then it runs thus. That the Defendant's Postea tantas minas, &c. intulerunt quod idem J. S. per longum tempus circa negotia sua necessaria palam intendere non audebat; and though this be uncertain, for that no time is alledged, yet it being not the substance of the Action, but only for aggravation of damages, and in as much as evidence could not be given of any threats, after the rest of the Bill, or damage by reason of them, therefore being after a Verdict, it was resolved to be good enough.

Lastly, It was resolved, That it shall not be intended in this case, that the Jury have given damages with respect to the time brought in by the last Scilicet, after per longum tempus, which over-reaches the time that the threats were made; (the time brought in by the first Scilicet being taken to be void) but that

the time mentioned in both places being in Judgment of Law taken to be void, and as out of the Declaration, it shall be taken to be out of the consideration of the Jury in taxing the damages, and for this the Case in 20 H. 6. 15. was cited by Roll; where a Trespass was laid with a continuando usque diem impetrationis brevis, viz. 14. diem Febr. anno 17. whereas the Writ bare teste 12. Octob. anno 17. which was before the day alledged for the time of the continuance. And yet the Plaintiff after a Verdict had his Judgment. And Hunt and Lawring's Case, Hob. 284. a. where in Trespass, &c. per quod servitium amisit, per longum tempus, viz. per spatium 6 mens. tunc proxim. sequent'. And the Original bore teste within the six months; and after a Verdict the Plaintiff had Judgment, for that the viz. was more then needs. And Judgment was given for the Plaintiff in the principal Case.

Tanner *versus* Lawrence. Trin. 23 Car. Rot.

Assumpsit.

In an Assumpsit the Plaintiff declares, That in consideration that the Plaintiff would buy certain pieces of Cloath for the Defendant's use; the Defendant promised that he would give him 2 s. for every piece that he should so buy, and avers that he bought 100 pieces for the Defendant's use, for which he ought to have 10 li. and alledges a special request of the said 10 li. to be paid by the Defendant according to his promise. And upon non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Plaintiff hath not averred that he gave notice to the Defendant how many pieces of Cloath he bought for him; to which it was answered, that this special request to pay 10 li. according to his promise, doth imply a giving notice of what he bought. But it was resolved, that notice is necessary in this case, and not supposed by this special request; for the Defendant cannot tell that so much is due as the Plaintiff requires, unless he had notice of what Cloath he bought for him. And Judgment was given against the Plaintiff.

Brooke *versus* Brooke. Trin. 23 Car. Rot. 580.

Debt.

In Debt upon a Bond of 40 li. with Condition, That if the Obligor at or before the Feast of St. John Baptist next following,

following the date, should make an absolute estate of Inheritance to the Obligee of such Lands, then, &c. the Defendant pleads, that after the making of the Bond, at all times before, and at the said Feast of St. John Baptist, he was ready upon the Land to make such an Estate to the Plaintiff, &c. And upon Demurrer it was adjudged for the Plaintiff, because the Defendant ought to have given the Plaintiff notice that he would make him such a conveyance, to the making whereof the presence of the Plaintiff was necessary: but if the Condition had been for the making of a Feoffment, then for that a day certain was appointed, the plea had been good, for the Plaintiff at his peril ought to attend at the day. Vide Co. 5. 22. g.

Parmenter *versus* Cressley. Trin. 23 Car. Rot. 1034.

In an Assumpsit the Plaintiff declares, That in consideration of twelve pieces of Stuff, of the value of 42 li. 15 s. delivered by the Plaintiff to the Def. the Def. promised to deliver to the Plaintiff so many Pipes of Sack, which the Defendant then had lying in a certain Cellar of a stranger in London, as should be of the value of the said Stuff, per præfat' querent eligend'. And the Plaintiff avers, that at Norwich he did require the Defendant deliberare vinum prædict' præfat' querent' ad eligendum so many of the Pipes as should be of the value of the Stuff, &c. And after a Verdict for the Plaintiff, upon non Assumpsit pleaded, upon motion in arrest of Judgment it was so resolved, 1. That a special request is necessary in this case, because the Defendant cannot deliver the Wine in this case before the Plaintiff hath made his election, and there is no reason that the Defendant should require the Plaintiff himself to make his election, as he ought to doe if the promise had been to deliver them to a Stranger: Then it was objected that the request was not well made. 1. Because it was made at Norwich where the Defendant cannot deliver the Wines. 2. Because the request was to deliver the Wines, whereas the Defendant is not by his promise to deliver them till the Plaintiff shall have made his election.

But it was resolved that the request was well made: for 1. The Plaintiff must make his request where he can meet with the Defendant, and thereupon the Defendant ought to appoint a reasonable time when he will be ready to goe with the Plaintiff to the Celler, that he might make his election. 2. The request

in respect of the manner was well, for he hath directly performed the agreement, which was to deliver them to the Plaintiff to be chosen; and therefore it is as much as if he had required him to perform his promise, which must be by shewing the Plaintiff the Wine in the Celler, to the intent that he might make his choice, which is not to be of the species of Sack; viz. whether Canary or Sherry, &c. for then indeed the Plaintiff should have made his choice before he could have requested the delivery, but of the goodness of it. And therefore he must tast the Wine (as Roll said, and Bacon did not deny it) before he need make his election. And upon good debate the Plaintiff had his Judgment.

Gurman *versus* Hill. Pasc. 23 Car. Rot.

Debt.

IN Debt upon Bond with Condition to perform an Award of all Controversies; Upon nullum arbitrium pleaded, the Plaintiff set forth an Award de & supra præmissis, that the Defendant should pay so much to the Plaintiff in satisfaction of all Controversies between them till the day of the Award made: And upon great debate made, it was adjudged a good Award; for the Court shall not conceive any new Controversie arisen between the Submission and the Award, unless the Defendant shews it. And the rather, because it was pleaded to be de & supra præmissis, which carries an intendment of an Award proportionable to the Submission. And Browne and Goffee's Case, Hob. 190. was cited accordingly. Hil. 14 Jac. Rot. 593. C. B. the same Judgment given between Paine and Lee.

Mich. 23 Car. Banco Regis.

Paradine *versus* Jane. Hil. 22 Car. Rot. 1178, & 1179.

Debt.

IN Debt the Plaintiff declares upon a Lease for years rendering Rent at the four usual Feasts; and for Rent behind for three years, ending at the Feast of the Annunciation, 21 Car. brings his Action: The Defendant pleads, that a certain German Prince, by name Prince Rupert, an alien born, enemy to the King and Kingdom, had invaded the Realm with an hostile Army of men; and with the same force did enter upon the

Defen-

Defendant's possession, and him expelled, and held out of possession from the 19 of July 18 Car. till the Feast of the Annunciation, 21 Car. whereby he could not take the profits; whereupon the Plaintiff demurred, and the plea was resolved insufficient.

1. Because the Defendant hath not answered to one quarters Rent.

2. He hath not averred that the Army were all Aliens, which shall not be intended, and then he hath his remedy against them; and Bacon cited 33 H. 6. 1. e. where the Gaoler in bar of an escape pleaded, that Alien enemies broke the Prison, &c. and exception taken to it, for that he ought to shew of what Countrey they were, viz. Scots, &c.

3. It was resolved, That the matter of the plea was insufficient; for though the whole Army had been Alien enemies, yet he ought to pay his Rent. And this difference was taken, that where the Law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the Law will excuse him. As in the case of Waste, if a House be destroyed by Tempest, or by Enemies, the Lessee is excused. Dyer 33. a. Inst. 53. d. 283. a. 12 H. 4. 6. so of an Escape. Co. 4. 84b. 33 H. 6. 1. So in 9 E. 3. 16. a Superfedeas was awarded to the Justices, that they should not proceed in a Cessavit upon a Cesser during the War; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his Contract. And therefore if the Lessee covenant to repair a House, though it be burnt by Lightning, or thrown down by Enemies, yet he ought to repair it. Dyer 33. a. 40 E. 3. 6. h. Now the Rent is a duty created by the parties upon the reservation, and had there been a Covenant to pay it, there had been no question but the Lessee must have made it good, notwithstanding the interruption by enemies, for the Law would not protect him beyond his own agreement, no more then in the case of reparations: This Reservation then being a Covenant in Law, and whereupon an Action of Covenant hath been maintained, (as Roll said) it is all one as if there had been an actual Covenant. Another reason was added, that as the Lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his Lessor; and Dyer 56. 6. was cited for this purpose, that though the Land be

Nota.

Vide Co. 482d.

rounded, or gained by the Sea, or made barren by Wild fire, yet the Lessor shall have his whole Rent : And Judgment was given for the Plaintiff.

Wheeler *versus* Walroone. P. vel T. 18 Car. Rot. 600.

By devise of all the rest of his Goods, Chattels, Leases, Estates, Mortgages, &c. to his Wife, passed but an Estate for life. Crooke 3. part 447, 449, 450. the reason.

IN an Ejectione firmæ : Upon a special Verdict, the case was, that one being seised of the Manor of D. and other Lands in Somersetshire, by his Will in writing devised the Manor to A. for six years, and part of the other Lands to B. in fee ; and then comes in this clause, And the rest of all my Lands in Somersetshire, or elsewhere, I give to my Brother, and the Heirs of his Body. And the question was, whether the reversion of the Manor passed or no ; for it was said, that the word Rest did extend only to such Lands as were not devised before : but it was adjudged for the Defendant, that the reversion of the Manor passed by the devise.

Baker *versus* Edmonds. Hil. 22 Car. Rot. 222.

Action sur le Casé.

IN an Action upon the Case the Plaintiff declares, That the Defendant was indebted to one Gode in the sum of 43 l. 1 s. for, &c. And being so indebted, promised to pay him ; which Gode was indebted to the Plaintiff, and became Bankrupt ; whereupon a Commission upon the Statute was sued forth, and the Commissioners did assign debita præd' Gode in quadam schedula continent' præd' summam 43 li. 1 s. to the Plaintiff, &c. the Defendant pleads, that he made no such promise to Gode. And by special Verdict it was found, that the Defendant was indebted to Gode but in 41 li. 1 s. which he promised to pay ; and that the Commissioners assigned debita præd' Gode mentionat' in quadam schedula continent' præd' summam 43 li. 1 s. to the Plaintiff. And if this be same promise that the Plaintiff hath declared upon, they find for the Plaintiff. And two Objections were made. 1. That it is not the same promise, because the Plaintiff hath declared of a promise to pay 43 li. 1 s. and the Jury find the promise to be but of 41 li. 1 s. 2. That upon the whole Record it appears, that the Plaintiff hath not made a good Title to his Action, for he hath alledged the Assignment to be of a debt of 43 l. 1 s. whereas the debt was but 41 li. 1 s. And this being an entire thing

thing will not pass by the Assignment of a greater sum: But it was answered and resolved, 1. That it is the same promise; for if Gode himself had brought the Action, he should have recovered upon this Verdict, and the Assignment by the Commissioners vests the Debt in the Plaintiff. And he hath the same remedy to recover as the Bankrupt himself had. And the difference was taken between an Action upon the Contract it self, &c. for there if the party mistakes the sum agreed on, he fails in his Action; but if he brings his Action upon the promise in Law, which arises from the Debt, there, though he mistakes in the sum, he shall recover, and so hath it been adjudged. 2. The Assignment is not in question, for the Issue and Verdict are concluded to the promise; and so that which they find touching the Assignment is not material, howsoever the Assignment is not laid to be of such a sum, as by that name, for then it would have been a question whether good; and the Court inclined that it would not have been good.

Dyer 219. g.
21 E. 4. 22. a.

Br. Issue joyn 80.

Mich. 23 Car. Banco Regis.

But the Assignment is laid to be of the Debts of Gode, mentioned in a schedule containing that sum; and so it was found by the Jury, therefore the Court shall intend it to be in such a manner, as that the Debt of 41 li. 1 s. might well pass thereby. And after much debate Judgment was given for the Plaintiff.

Munday *versus* Bailly. Trin. 23 Car. Rot. 83. or 82.

In an Assumpsit upon an Indebitatus for Rent reserved upon a Lease for years: After a Verdict for the Plaintiff upon non Assumpsit, Judgment was given against him, because the Action will not lie for Rent, but he must have an Action of Debt for it.

Assumpsit.

Lawrence *versus* King, and others.

In an Ejectione firmæ upon a Lease of a House in Newington Common, Oxon. Upon not guilty, the Jury appearing at Bar, one was challenged, because he was Tenant of a Manor, to which there was a Court Leet, of which the Plaintiff was Steward. And the Court inclined, that it was no principal challenge; but for want of sufficient proof it fell off, and the Court

Ejectione firmæ

would not examine him upon a voir dire after it. Another was challenged by the Defendant, and being upon his Trial, soit treit, said the Plaintiff, but not allowed; for that must be upon the Challenge, and not upon the Trial, and therefore he was tried and sworn.

And the Case upon the Evidence was, that Tenant in Capite of certain Lands, and the House in question, conveyed all (as it was found by Office) to his youngest Son, and died, his eldest Son and Heir being within age, who attained to his full age, and died before livery sued. And the younger Son entred, and made a Lease to the Plaintiff of the whole Land; and whether this Lease was good for the whole, was the question. And the Plaintiff's Counsel offered to prove by another Office, that other Lands were left to descend to the eldest Son, which were more then a full third part of the whole Lands the Tenant had: but it was not allowed, for the Office wherein the House in question is found, is a Record by it self, and the King's Title must be taken as it is found in that, and not as it stands by comparison with another Office. 2. It was a question, whether a Lease made by the younger Son in this case before seisure (for none could be proved) were not good for the whole. And it was holden to be void as to a third part, and so it was, though the third part were not set out by the Statute; for the King's interest commenced by the Office before seisure, and before setting out of the third part. 3. It was agreed, that the Land continued in the King's hands for a third part, till an ouster le maine sued, though the Heir were dead. 4. It was agreed by all, that where an ouster le maine is necessary, a Lease for years made before is not good. And Bacon said, that where the Heir of the King's Tenant in Capite dies before livery sued, that the Land is not Debtor for the Arrears (which the King ought to have from the death of the Ancestour in such case) till they are computed by an Officer in the Exchequer, and made a Debt upon Record, and then the Land is Debtor. And after much dispute a Juror was drawn by consent of parties.

1 H. 7. 5. c.

Stamf. 35. c.
l. 8. 175. c.
13 H. 4. 3. g.
h. 14. a.
1 H. 7. 5. c.
21 H. 7. 7. b.

Dutton *versus* Eaton. Hil. 22 Car. Rot. 929.

Action sur le
Case.

IN an Action of the Case for speaking divers slanderous words of the Plaintiff, amongst which were these words, Thou hast the French Pox: upon not guilty, the Jury found that he spake all the

the words in the Declaration exceptis his verbis, thou hast the French Pox, & quoad the speaking of those words, they find that he said thou hast had the French Pox, & si, &c. they find for the Plaintiff, and assess entire damages. And the opinion of the Court was clear, that the variance was material; so that the Declaration was not maintained by the Verdict: And both the Judges inclined that the words found were not actionable, for they do imply that the Plaintiff had that disease, but was recovered: Then an exception was taken to the Verdict, because the Jury did not find that the Defendant did not speak the words in the Declaration. And yet this defect was not supplied by the words exceptis his verbis. And for this cause it was resolved, that the Verdict was insufficient, and a Venire facias de novo was awarded. Vide Dyer 75. a. 171. e.

Yearworth *versus* Pierce.

SLander. Thou art a Thief, and hast stolen my Dung: After a Verdict for the Plaintiff it was moved, that the words were not actionable; because Dung is an indifferent word to signify either Dung in a heap, which is a Chattel, or Dung spread or scattered upon the ground, which is parcel of the Freehold, and then no felony may be committed of it. But upon good debate Judgment was given for the Plaintiff, because the first words being plainly actionable, the effect of them shall not be taken away by subsequent words ambiguous; for when subsequent words should qualify the words precedent, they ought to carry in them a strong intendment, that they were spoken in such a sense as was not actionable; and then also Roll held they ought to be brought in by way of explanation by the word For, as to say thou art a Thief, for thou hast, &c. but if the words are, thou art a Thief, and hast stolen, &c. there the latter words are cumulative. But Bacon denied the difference, and cited Clerk and Gilbert's Case, Hob. 331. where that difference is denied, and said, that 8 Car. in the Common Pleas, where the words were thou art a Thief, and hast robb'd thy Kinsman of his Land, The Court was divided in opinion; but after upon Conference with all the Justices at Serjeants Inn, it was adjudged for the Plaintiff. And Roll denied both those cases to be Law; and said, that this latter case was resolved upon consideration of that in Hobert, which hath been often denied for Law in this Court. And he said, that he had conferred with Sir Robert Barkley and Sir John

Bramston, and their opinions concur with him in this point. And Roll held, that if the Defendant had said thou hast stolen my Dung, without any other words, they would have been actionable; for Dung in Common parlance is understood of Dung in a heap, which was agreed to be a Chattel, of which Felony may be committed, and goeth to the Executors; but if it lieth scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the Freehold.

Mich. 23 Car. Banco Regis.

Pierfon *versus* Dawson.

Slander.

Hob. 268. a.
l. 4. 169. 17. f.

SLander. The Plaintiff declares, That the Defendant, dixit Mariæ Pierfon Matri W. Pierfon the Plaintiff, your Son is a Thief; innuendo the Plaintiff, then the Son of the said Mary. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words are not laid to be spoken of the Plaintiff, but only in the innuendo, which cannot sufficiently ascertain the Declaration, because he might have many Sons: But yet upon good consideration Judgment was given for the Plaintiff; for the Court shall not intend that Mary had any other Sons besides the Plaintiff. And Roll cited a Case where one said, your Landlord Henley is a Thief, and laid his Declaration only with an Innuendo of the Plaintiff then Landlord, &c. and adjudged good. But in another Case, where one said your Landlord (without a Surname) is a Thief, in such an Innuendo, it was, after great debate (the Court being at first divided in opinion) adjudged naught: But there if the Plaintiff had averred that he to whom the words were spoken had no other Landlord, it had been good. Vide French and Edward's Case, su. 3.

More *versus* Clypsam.

Replevin.

In a Replevin the Plaintiff declares, That the Defendant cepit centum oves matrices & vervices of the Plaintiffs. The Defendant avows, that his Father was seised in fee of the place where, &c. and died seised, and that the Lands descended to the Defen-

Defendant as Son and Heir, by virtue whereof he entred, and was seised in fee, and took the Beasts damage feasant; the Plaintiff makes a reply, and concludes with a traverse absque hoc that the Defendant at the time of the taking was & adhuc est seised in fee of the Land, and issue thereupon was found for the Plaintiff. And it was moved in arrest of Judgment that the Traverse was naught. 1. Because the title of the Avowant is not answered, for that the dying seised of the Father, and the descent, and the seisin of the Avowant, is but a conclusion upon that. 2. Because the Traverse is larger then the Avowry, for adhuc est, refers to the time of the pleading, which is more then is alledged, or then is material. To the first it was answered, that though it be not formal, yet it is substantial enough; for if the Son were not seised, there could be no descent to him, and therefore it is made good by the Verdict; and the Court inclined to this opinion. But the other exception was holden to be material. Then an exception was taken to the Declaration, because it is for 100 Ewes and Wethers, and it doth not appear how many there are of Ewes, and how many Wethers; and the Sheriff is bound to make deliverance of the one sort and of the other, for his delivery must be according to the Writ. And though he may receive information from the parties, so that it is a good return to say nullus venit ex parte querent' ad ostendend' averia, &c. yet he is not bound to require it, but ought to have sufficient certainty within the Record. And for this cause, after great debate, Judgment was given against the Plaintiff; but it was agreed, that oves without addition had been good enough, and the Sheriff might have delivered the one sort and the other: But if the Writ be for oves matrices, the Sheriff cannot deliver Wethers; so if it be for Black Horses, the Sheriff cannot deliver White, but is subject to an Action of Case. Now there being some Ewes and some Wethers, and the number not appearing, the Sheriff is left at uncertainty; and upon the same reason a Formedon of 100 Acres of Meadow and Pasture hath been adjudged naught, as Roll said.

Com. Northumb. *vers.* Green. Trin. 23 Car. Rot. 1198.

IN Debt for Rent the Plaintiff declares, That one Cross made ^{Debt.} a Lease for years to the Defendant rendering Rent payable half yearly, who granted the reversion to the Plaintiff, and such a day (which was the day wherein the Rent was due) the Defendant

pendant attorned ; and for three years Rent and a half, which included the Rent due, the day of the attornment the Action was brought ; and upon nil debet, and a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Rent was payable to Crofs before the attornment ; for that shall be taken (if worst for the Plaintiff) to be after Sun-set ; but it was disallowed : for the Court shall not intend it : and if they should, the Verdict supplies the averment of the contrary. And both the Judges said, that if a Writ abate one day, and another Writ is purchased, which bears teste the same day, it shall be intended after the abatement of the first.

Caly versus Joslin & Uxor. Trin. 23 Car. Rot. 1282.

Debt.

IN Debt for Rent upon a Lease for years against the Husband and Wife, Executrix, which was laid in the debet and detinet ; Upon plene administravit pleaded, and a Demurrer thereupon, the case was well debated by reason of contrary resolutions ; for Hargrave's Case was reversed in the Exchequer, Co. 5. 31. because the Action was in the debet and detinet ; but afterwards, 7 Jac. between the Lord Rich and Frank. in C. B. upon great debate it was adjudged good in the debet and detinet. And the like Judgment was given 9 Jac. in C. B. in Sir Henry Carye's Case. And after that, Pasc. 17 Jac. Rot. 346. B. R. between Paule and Moody it was adjudged good in the detinet only. And the like, 7 Car. in the Common Pleas, and the same year in this Court between Smith and Nichols ; and the reasons of these contrary opinions was the inconveniency of the one side and the other ; for in as much as the Executors cannot waive the Term, it were hard if the Rent should exceed the value of the Land, and they having no assets, that they should be charged in the debet of their own proper Goods, and yet if the Action must be brought in the detinet only, where fully administered were a good plea, then may they retain the Land, and with the profits thereof satisfy Debts upon Specialty, whereby the Lessor should be defeated of his Rent : For the avoiding of which inconveniencies, it was resolved, that they may be charged in the debet and detinet, for prima facie the Land shall be intended to be of greater value than the Rent, and if it be otherwise, ———

Mich.

Mich. 23 Car. Banco Regis.

Gilbert *versus* Stone. Trin. 17 Car. Rot. 1703.

IN Trespafs for breaking of a House and Close, the Defen-^{Trespafs.}
 dant pleaded, that 12 homines ignoti modo guerrino armati
 tantum minabantur ei quod de vitæ suæ amissione dubitabat,
 and after requirebant & compulsabant the Defendant to goe with
 them to the House, quodque ob timorem minarum & per manda-
 tum & compulsionem dictorum 12 hominum he did enter the
 said House, and returned immediately through the said Close,
 which is the same Trespafs, &c. And upon Demurrer, without
 argument, it was adjudged no plea; for one cannot justifie a
 Trespafs upon another for fear, and the Defenant hath remedy
 against those that compelled him: Also the manner of the plead-^{Hob. 134. c.}
 ing was naught, because he did not shew that the way to the
 House was through the Close.

Mark *versus* Cubit. Pasc. 23 Car. Rot. 376.

SLander. You are a Rogue, you are a traitorly Rogue, you Slander.
 cheated your Father; you are a branded Rogue, you have
 held up your hand at the Bar; you have deserved to be hanged,
 and I will have you hanged: And after a Verdict for the Plaintiff
 for all the words (except traitorly Rogue) the question was, whe-
 ther the words branded Rogue would maintain the Action (for it
 is clear, none of the others would) because (as was pretended)
 the most that they impart, is, if he hath been branded for a Rogue
 by virtue of the Statute of 1 Jac. cap. 7. then his punishment is
 past, and consequently the words not actionable, because they can-
 not be any damage to him: But upon debate, Judgment was
 given for the Plaintiff; for by that Statute if a branded Rogue
 wander again, it is Felony; and so the words put him in a nearer
 degree of Felony than otherwise he should be.

Brown & Wood.

Administration was granted to the Sister of the half Blood of the Intestate and her Husband, by the Prerogative Court, and the Brother of the whole Blood sued there to have the Letters repealed; and upon motion for a prohibition, upon this suggestion it was agreed by the Court, that the Sister of the half Blood is in equal degree of Kindred with the Brother of the whole Blood, within the Statute. And so was it resolved, 1 Car. between Glascock and Wingate, known by the name of Justice Yelverton's Man's Case. And if the Ordinary hath once executed his power according to the Statute, he cannot repeal the Letters upon a citation; but it was resolved, that the Statute was not observed in the Grant of the Letters in this case, because the Husband, who is not of kin to the Intestate, is joyned with the Wife; and if she should die before him, he should continue Administrator against the meaning of the Statute. And for this cause a prohibition was denied; but it was said, that if it had been granted to them only during the Coverture, perhaps it might have been good, because the Husband might have administered during the Coverture, though it had been granted to the Wife only.

Hil. 23 Car. Banco Regis.

Hilliard & Ux. *vers.* Hambridge. H. 22 Car. Rot. 1010.Action sur le
Case.

In an Action upon the Case against an Executor upon a promise of the Testator made to the Husband and Wife, in consideration of their Marriage had at his request to pay 8 li. per annum to the Wife during the Coverture; after a Verdict for the Plaintiff, upon non Assumpsit pleaded, it was moved, Termino Hil. 22 Car. in arrest of Judgment, that it should be brought by the Husband only, the promise being made after the Coverture, because the whole benefit thereof is to redound to the Husband, and thereupon Judgment was stayed. But this Term the Case being moved again, Judgment was given for the Plaintiff; for it is in the election of the Husband to bring the Action alone, or to joyn with his Wife: as 43 E. 3. 10. 15 E. 4. 10. c.

10. c. 7 E. 4. 6. a. 7. a. Br. Baron & Feme 55. in case of a Bond made to them both after Coverture : And the Case was held to be stronger, because it is an Executoy promise of a thing of continuance, than if it had been to be done unica vice. Vide 48 E. 3. 18. f. 16 E. 4. 8. e.

Ecls versus Smith.

SLander. She hath married the Husband of another Woman. Slander. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words would not bear Action, for the Plaintiff's Wife might be dead, or beyond Sea by the space of seven years, and then the Case is out of the Stat. of 1 Jac. cap. 11. And though it be alledged in his Declaration that he had no other Wife, yet the words must be taken as they were spoken before the auditors. And perchance the meaning might be that the Plaintiff was contracted to, and so in Conscience was the Husband of another Woman ; and Judgment was given against the Plaintiff.

Yates versus Lindall.

SLander. She is a Sorcerer and a Witch, and can witch and Slander. unwitch ; she is a white Witch, and can witch and unwitch. And after a Verdict for the Plaintiff, Judgment was given against her, because she is not accused of any offence within the Statute.

Gawdy & Congham. Mich. 23 Car. Rot. 348.

IN a Writ of Error upon a Judgment in C. B. in an Action of Debt against Executors, who pleaded fully administered, and the issue being whether Assets or no, it was found that they had Assets for part onely ; and Judgment was given for to recover the whole Debt. And it was moved by Hales for Error, that it should have been for so much only as was found in the Defendants hands, and so are all the Presidents in that Court, which he said he had caused to be searched ; but the Judgment was affirmed,

firmed, for it is good either way; and in this Court it is the course to give Judgment for the whole, according to Mary. Shiplie's Case. l. 8. 134.

Eeles versus Lambert. Mich. 22 Car. Rot. 357.

Covenant.

IN an Action of Covenant the Plaintiff declares, That Sir Moulton Lambert the Testator, did demise to him a Wharf, called the Wharf-ground near the Common Dike, and other Tenements, for 21 years; and Covenanted that he might quietly enjoy them without the interruption of the said M. L. his Heirs or Assigns, vel aliquar' personar' clamantium per præd' M. L. hæred' vel assignat' suos vel per eorum medium consensum vel procuracionem, nisi, &c. and assigns for breach, that one Mich. Clavel clamans titulum à præd' M. L. postea, scil. 20. Feb. 17 Car. did enter upon him, and eject him, &c. the Defendant pleads plene administravit, and Issue being joyned thereupon, the Jury found that Sir M. L. 15. Jun. 1634. made his Will, and made the Defendant his Executor; and by the same Will, dedit diversa legata bonorum in specie separalibus personis in dicto Testamento nominatis, ac postea obiit, post cujus mortem, the Defendant 11 Car. bona præd' sic ut præfertur in specie dat' ad valentiam 500 li. in executionem Testamenti præd' præd' separalibus personis in eodem Testamento nominat' deliberavit, and find the breach of Covenant to be six years after, and that no other Goods of the Testator came to the hands of the Defendant: & si, &c. pro querent', &c. And the Case was argued by Green and Latch ex parte querentis that the Goods delivered for Legacies are Assets in the Executors hands, as to this contingent Covenant.

1. That the Executors shall be intended consulant of all Contracts and Duties of the Testators, as well present as future, as well contingent as certain; and that therefore this contingent Covenant lay as a charge upon the Testator's Estate.

2. That such contingent Covenants are common assurances much favoured in Law, which may all be easily defeated, if the disposition of the Covenants by his Will should stand good against them; for though the Executors should afterwards voluntarily break them, yet the recompence must be had only out of the Testator's Estate.

3. A diversity was taken between Debts without specialty, and Legacies.

Legacies, for those are duties of the same nature with Debts upon specialty, but differ only in order and dignity; but these are meer gratuities, for which no Action lieth at the Common Law; and therefore are not taken notice of by Law as duties, but the remedy for them is in the Court Christian.

4. The Executor was not compellable by the Ecclesiastical Court to pay these Legacies, unless the Legatees in this case would give caution to repay them if the contingent Covenants should be broken. And so it was said is the course in Chancery at this day in the like cases. And Hales and Twisden ex parte Defendentis argued to the contrary.

1. It was agreed by them, and also by the Court, that though the Legacies were devised in specie, yet the Legatees could not take them without the assent of the Executors. And that therefore the Case was the same as if the Legacies had been of money. Indeed there is a difference between these Legacies; for Legatum quantitatis est Legatario, as Legatum in specie est.

2. It was agreed, that if the Covenant had been broken before the delivery of the Legacies, the Administration would have wrought a Devastavit; but the Legacies being first delivered, it was argued, that the Executors ought not to be charged in a Devastavit upon this Covenant.

1. From the nature of the thing it self; for a Covenant is no Duty, nor cause of Action, till it be broken; and therefore is not discharged by a release of Actions: And when it is broken, the Action is not founded merely upon the specialty, as if it were a Duty, but labours of Trespas; and therefore an Accord is a good plea to it, and ends in damages.

2. From the qualification of it in respect of the contingency of the breach thereof; for it is to be presumed, that it will be rather performed than broken.

3. From the inconvenience that such a Covenant should obstruct the performance of the Will, for it is a present and certain mischief, that Legacies should not be paid; and it is but a possible and contingent mischief that the Covenant should be broken, and the Covenantee unsatisfied; and therefore admitting that it were in place where by custome a rationabili parte bonorum would lie, it would be very hard that the Children should expect, till it were known whether the Covenant would be broken or no, which may perchance continue in suspense for ever; for such Covenants are commonly annexed to Estates in fee. Now the reason is the same in case of Legacies; for where it hath been said

that the Common Law takes no notice of them, so as to give remedy for them, it was answered,

1. That the Law takes notice of a Legacy so as to create a Duty in the party to whom it is bequeathed, though he cannot take it without the assent of the Executors; for after such assent the Law vests the property of the thing bequeathed in the Legatee, and therefore a Condition imposed upon the assent is void.

2. The Probate and ordering of Wills did belong originally to the Jurisdiction of Temporal Courts, where the Legatees might have had remedy for their Legacies, as appears by Glanvil, lib. 6. cap. 6, & 7. where there is a Writ to demand a Legacy at the Common Law; and now that the Jurisdiction is devolved to the Ecclesiastical Court, the Common Law takes notice of the remedy there for Legacies; for the power of that Court is regulated by these, and therefore forbearance of Suit there hath been adjudged a good consideration of a promise; and for the same reason Hale said he conceived, that if an Executor of his own wrong paid Legacies, the rightfull Executor should be bound thereby, because he was compellable by Law to pay them.

3. Though the Executor were not compellable by Law to pay the Legacies, yet now that payment is executed, the Law takes notice of it to vest the property of the Goods in the Legatees. And this being before any Covenant broken, the Administration will be good. As to the Objection concerning provisional payment of Legacies, it was answered,

1. That it is the common case almost of all persons that have any dealing in the Kingdom, to make such Covenants, and to give Portions to their Children by Will, and this is all the maintenance many of them have; and therefore it is difficult for them to find security for the payment of that whereof they live.

2. Though the Ecclesiastical Court, in a prudential way, use sometimes to take caution for repayment, yet they are not bound so to doe. And therefore this Court cannot take notice thereof.

3. It hath been agreed, that payment of Debts upon simple Contracts is a good administration against Judgments defeasible upon performance of Covenants; and yet the same provisional payment might be made in that case, but the Law doth not compell it, *pur que*, &c.

And the Case being thus argued, the last Trinity Term, and this

this Term, two Exceptions were taken by Bacon to the Declaration,

1. That the Plaintiff hath not conveyed to himself a good Title to the Tenements, for he alledges a demise of them habendum to the Plaintiff, but he is not named in the premises; but this was after agreed to be well enough, for a Lease so made is good. And Latch said it had been so adjudged.

2. That the breach was not well assigned, for the Covenant is against all persons, claiming by the assent, means or procurement of Sir Moulton; but the breach assigned is, that Clavel clamans titulum from Sir M. did enter; now he might claim Title from him, when as in truth he had no Title from him. And for this cause Judgment was given against the Plaintiff. And the Judges would not deliver their opinions upon the matter in Law, but upon the Arguments. Roll did incline for the Plaintiff, upon the provisional payment that might be made, and said, that Prohibitions have been denied upon suggestion of a Suit in the Ecclesiastical Court, where contingent charges have been pleaded, because this Court takes notice of provisional payments which are used to be made there; also he approved of the diversity between Debts without specialty, and Legacies. And Bacon inclined to the Defendant for the reasons before alledged.

Hil. 23 Car. Banco Regis.

Holdwich & Ux. *vers.* Chafe. Pasc. 23 Car. Rot. 326.

IN an Action of Debt by the Husband and Wife Executrix, upon a Bond supposed to be made to the Testator, non est factum being pleaded, it was found to be made to the Testator and another, who died before the Testator. And if it were his Deed modo & forma prout, &c. was referred to the Court. And Maynard argued for the Plaintiff.

1. That the Plaintiffs might declare as upon a Bond made to the Testator only, because the Duty accrued to him only by survivorship. And cited 35 H. 6. 38. h. where a Lease was made to two persons rending Kent; and one dying, Debt was brought against the survivor, as upon a Lease made to him only; so

Inst. 185. b.
Dyer 133. h.

¶

where

H. 6 E. 3. 12.

where two Jointenants were joyned in a Lease, and one released to the other in an Action of Waste, he counted of a Lease made by himself only, and adjudged good. 46 E. 3. 17. c. 33 H. 6. 4. h. so it is where a right only survives, as Mich. 18 E. 2. in a Case not printed.

2. Infants Jointenants joyned in a Feoffment, and one died, the survivor brought a dum fuit infra ætatem, and declared that the Tenant had not the land nisi ex dono of the Demandant, dum fuit infra ætatem. And the Tenant pleaded in abatement, that it was conveyed to him by them both; the Demandant replied that the other was dead, and adjudged for the Demandant. (Note the same Law holds where a charge survives, as if two join in a Bond, the Obligee may have Debt against the one only; And it was no plea for him to say it was made by him and another, unless he say he is in full life, as appears 28 H. 6. 3. c. & su. 11. a.) But where nothing survives, there the Case ought to be alledged as the truth was; as if two Jointenants make a Feoffment, and the one dies, the Feoffor cannot plead this as a Feoffment made by the survivor only: Otherwise where a Feoffment is made to two, and one dies, 14 E. 4. 1. h.

3. The matter of variance goes but in abatement, and therefore cannot be pleaded in Bar; also non est factum is no plea in the Case: And Whelpdale's Case, l. 5. 119. was cited, and Judgment was given for the Plaintiff without further argument. Nota, if the Defendant in this Case had demanded Oyer of the Deed, and caused it to be entred in hæc verba, he might have demurred to the Declaration, as should seem by 36 H. 6. 16. d. g. & 32. a. & l. 5. 76. e. And the Court ex officio ought to have abated the Bill: So Note the difference. And see Blackwell and Ashton's Case. su. 11. a.

Royston *versus* Cordryc. Trin. 23 Car. Rot. 1677.

Debt.

IN an Action of Debt brought against an Executor upon a Lease for years made to the Testator for Rent due after his death in the detinet: after a Verdict for the Plaintiff quod detinet, it was moved by Hales in arrest of Judgment that the Action ought to have been in the debet and detinet for the reasons in Hargrave's Case, l. 5. 31. for nothing shall be Assets but the surplus, of the value of the Land exceeding the Rent. And therefore the profits of the Land proportionable to the Rent are taken to

to his own use, and therefore he is to be charged as for his proper Debt; and it cannot be presumed that the Land should be of no value, but contrarily that they should be of greater value than the Rent. And therefore in an Abowry upon an Abbot for Rent he cannot disclaim generally, unless he shew that the Land is of less value than the Rent. 43 Ass. pl. 23. 16 H. 7. 2. so that if the Land here had been worth nothing, or of less value than the Rent, the Plaintiff ought to have shewn it in his Declaration, for this cannot be made up by the Verdict; for (besides that the indentment is too remote to be supplied, for which see King and Somerland's Case, su. 9. a.) the Verdict is true though it be otherwise; for he that is said debere & detinere may well be said detinere.

2. The Executor is now charged as Ter-tenant, and not upon the pivity of Contract with the Testator, and therefore the Action will not lie against him after Assignment; and for the same reason it ought to be brought where the Lands lies, so that he ought to be charged in the debet and detinet in respect of the Land and the profits, and not in the detinet, as upon the Contract. But yet upon debate Judgment was given for the Plaintiff, for the Executor demands his interest, whereby the Charge accrues from the Testator, so that he may answer the Rent out of the Testator's Estate, and the sole inconvenience is to the Plaintiff himself, who waives his advantage to demand satisfaction out of the Estate of the Defendant, and contents himself with what the Testator's Estate will afford; and therefore it was never doubted but that the Action might be brought in the detinet only; but it hath been much doubted whether it might be in the debet and detinet. Vide Caly and Joslin's Case, su. 15. Also Roll said that in many places the Land becomes of no value by reason of the troubles, and then he ought to be charged in the detinet onely. And the Verdict doth supply this Indentment.

Hil. 23 Car. Banco Regis.

Page and Harwood.

PAge and Harwood, and one were indicted at the Indictment.
 Assises at Nottingham upon the Statute 1 Jac. 8. for stab-
 bing one And the Indictment was, that stabbd
 D 2 him,

him, and Page and Harwood were present, abetting, &c. and contra formam Statuti, and all there were found guilty contra formam Statuti, and was hanged in the Countrey; but Roll doubted whether these two were within the Statute, and therefore adjourned them hither. And Walker produced a President 16 Car. where one Welsh and five others were indicted at the Sessions in the Old Bailey upon this Statute for the death of one Swinnerton, and because all five were present, and it could not appear upon the Evidence which of them made the thrust, Bramston Chief Justice, Barkley and Jones directed the Jury to find them guilty of Manslaughter only at the Common Law; for though in Judgment of Law every one that is present, &c. is principal, so that the Indictment may recite that any of them did make the thrust, and the Jury should have found them equally guilty at the Common Law, yet in construction of this Statute, which is so penal, it shall be extended only to such as really and actually made the thrust, and not to those which by construction of Law only may be said to make it; for the end of the Statute was to restrain the rage and cruelty of such persons as would suddenly stab another. And accordingly it was resolved in this case that the offenders should have their Clergy.

Then another question was made upon the Indictment, which is contra formam Statuti, and accordingly they were all found guilty by the Jury, whereas it appears that these are not guilty within the Statute: But it was answered and resolved, that upon this Indictment they might all have been found guilty at the Common Law; then when all are found guilty within the Statute the Verdict shall be taken as it may stand by Law: And the substance of the Indictment being found the rest is but surplusage which hurteth not the Verdict: And the Court held that the Indictment need not conclude contra formam Statuti, because the Statute doth not alter the nature of the offence, but only takes away the privilege which the Common Law allowed in such case; and therefore it is sufficient that the circumstances be expressed in the Indictment, whereby it may appear that the offence is within the Statute, and the Offenders had their Clergy, and upon their reading were burnt in the hand in conspectu curiae.

Price *versus* Vaughan. Trin. 14 Car. Rot. 1160.

IN an Ejectione firmæ upon a special Verdict upon not guilty Ejectione firmæ pleaded, the Case was briefly thus. Walter Vaughan being seised in Fee of the Land in question, devised it to Francis his eldest Son, and the Heirs males of his Body; the remainder to his second Son, and the Heirs males of his Body, with other remainders; the remainder to the Heirs males of the Body of the Devisor, provided if the eldest Son should die without Issue male; but having Issue female, then I do give full power and authority to the said Daughters to enter into the Lands, and to take the profits thereof untill he that first shall have the Lands, after the death of Francis, shall pay to each of them 400 li. towards their Marriage, and dies; Francis dies without Issue male, having a Daughter Elizabeth, who entered into the Lands, and died, the 400 li. being unpaid; her Administrator enters, and Leases to the Plaintiff, upon whom the younger Son of the Devisor enters, and him ejects; and if upon the whole matter the entry of the Administrator was lawfull, they find for the Plaintiff: And the question in Law was, what Estate Elizabeth had, and it was argued by Hale, Maynard and Brown for the Plaintiff.

1. That she had an interest; for an authority to take the profits implies as much as a devise of the profits, which gives an interest. 5 H. 7. 1. a.
27 H. 8. 16. r.
Dyer 210. d.
Br. Devise 48.

2. It is a Chattel, like to the case where a feoffment is made rendering Rent, with proviso that if it be arrear, the Feoffor may enter and hold the Land till it be paid; this gives a Chattel to the Feoffor: And so it is if the arrears were to be satisfied out of the profits of the land: And so it is in case of a devise to Executors till debts be paid. And so Brown said it was resolved in a Case between Eire and Haggard, Hil. 13 Jac. Rot. 868. C. B. where a Rent was granted out of the Lands, and if the Rent were behind, that the Grantor might enter into the Land and hold it till he were paid, that this was but a Chattel.

3. It was argued that this Chattel was transmissible to the Administrator, because if the portion it self had been devised, though it were toward Marriage, it would have gone to the Administrator: Now though the profits of the Land are but a gage till the portion be paid, yet it follows the Portion; as 20 H. 7. 1. a. as if a nomine pœnæ descend to the Heir with the Rent, so if Lands

are devised to Executors for payment of Debts, it goes to their Executors; and the Executors of Tenant by Elegit shall have an Assise, for the remedy goes with the duty, 2 Inst. 396. e. And in this case if it should not be so, the Portion might not be paid, which were contrary to the meaning and letter of the Will; for there is an expresse proviso, that the Lands shall not remain over till the money be paid; and Twisden and St. John, Solicitor, argued to the contrary. But St. John did admit it to be an Interest, but that it was no Chattel.

1. Because the devise is found to be in pursuance of Articles of agreement made for the like settlement to be made by the Testator in his life-time, but if such a settlement had been made in his life, it would have given a Freehold for life, and not a Chattel.

2. The devise was for advancement of Daughters, and it is found by the Verdict that 1200 Acres of Land are devised, in which, if the Daughters should have an Estate for life, it cannot but be intended to be as great or greater advancement, than if 400 li. only had been devised to them; and yet that the Testator looked upon as a sufficient provision: And therefore made the Estate determinable upon payment of that.

3. It cannot be thought that the Testator intended to give the whole Land to the Daughters, and to debar the Issue male of his younger Sons; and yet as this Will is penned, if it should not give a Freehold, then if the first man dies before payment, the Daughters should have it for ever; and Dyer 300 h. was cited. And for this cause also it cannot be a Chattel; for there cannot be a perpetuity of a Chattel upon no supposal; and therefore there is no more reason to say it should be a Fee in them than a Chattel. 2. If it be a Chattel it goes not to the Executors or Administrators.

1. Because it is personally limited to the Daughters, and not to their Executors and Administrators.

2. It is limited to them for their advancement, which doth not respect their Executors.

3. If it should goe to the Executors, then there would be a perpetuity of it. As to the Cases objected by the Plaintiff's Counsel, as 27 H. 8. 5. which was much insisted upon; where cestuy que use Covenants that his Feoffees shall suffer one of his Executors and Assigns to take the profits of the Land till he or they be paid 100 li. by the Covenants, &c. if he dies before he hath received it, his Executors shall hold it till they be paid: It was

was answered, that this was in case of a Use, which was then ruled merely according to equity, and by express words it was limited to the Executors; and there it was for money paid by the Covenantor, and so for a Duty which goes to the Executors. And for the case of a Devise to Executors for payment of Debts, there it is a Chattel in them which goes to their Executors, because otherwise Debts should not be paid, which is the special reason of that case, for such an Estate made by Grant will be an Estate for life, 1. 8. 96. c. And in the case of retaining Land till a Rent be paid, there the Land is taken but as a Distress, till the Rent which is a duty issuing out of it, be paid; but in our case neither the person nor the Land is Debtor, for no Legacy is devised to the Daughters, the Devise is only that they shall hold the Lands untill, &c. And it had been all one case if it had been made determinable upon any other limitation, as upon payment of money; also in all those Cases the Interest is determinable some way or other; but in our case it should be perpetual upon the contingency aforesaid.

Hil. 23 Car. Banco Regis.

Petchet *versus* Woolston. Pasc. 23 Car. Rot. 497.

Judgment was had against an Administrator in a Scire facias Scire facias. upon a Judgment against the Intestate, and a Fieri facias awarded; and upon nulla bona returned, and a testatum of Waste, a special Fieri facias was awarded to the Sheriff, quod si sibi constare poterit per inquisitionem, vel aliter, that the said Administrator vendidit elongavit vel ad usum suum proprium convertit the Goods of the Intestate, tunc scire faceret the Defendant why execution should not be had of his proper Goods; the Sheriff returns an Inquisition which finds a devastavit, and that Scire fac', &c. whereupon the Defendant comes and pleads payment, and an Acquittance as to part, and to the residue fully administered at the time of the first Scire facias awarded; whereupon the Plaintiff demurred, and the Case was argued the last Term, and this Term, that the plea was insufficient.

1. Because the plea was argumentative only, and did not directly answer the Charge by the Inquisition that he wasted the Goods of the Intestate, which being but an inquest of Office is traversable.

N 2

2. Fully

2. Fully administred is no good plea to a Charge by Judgment, for this supposeth the Goods came to his hand which he hath administred; and that he ought not to aberr generally in respect of the height of the Charge, which being by Judgment binds the Goods of the Intestate in his hands, and therefore he ought to shew specially how he hath administred. And Hales said that for this very cause, Pasc. 39 El. Rot. 14032 between Ordway and Godfrey fully administred pleaded to a Scire facias upon a Judgment against the Testator upon a demurrer was judged insufficient, and the like Judgment was given upon the same plea to a Scire facias, upon a Debt assigned to the King, Pasc. 2 Car. Rot. 28. in Ireland's Case: But he said if Issue were joyned it was helped, and so it was adjudged. Hil. 11 Jac. Rot. 19063. between Haper and Renold. To which it was answered by Maynard,

Dyer 80. 2.

1. That an argumentative plea is sufficient upon a general demurrer, but in this Case the Charge is not that he hath wasted the Goods of the Intestate, but the Writ requires us to shew cause why the Plaintiff should not have execution of the proper Goods of the Defendant: And we shew for cause that we have fully administred, which is a more proper plea than to traverse the Inquisition.

2. Though the Charge be by Judgment, yet we might have well administred, as by paying Debts upon other Judgments; and so ought the plea to be intended which is confessed by the Demurrer.

And Roll openly declared his opinion, the case being argued both the last and this Term, that the plea was good upon a general Demurrer; and for the Case of Ordway and Godfrey, he said it did not appear whether the Demurrer were special, but he said that Yelverton after he was overruled in it, said openly at the Bar, that he would maintain the plea to be good: And he said that it is a better plea in it self than to traverse the wasting of the Goods. And Bacon at first seemed to be of the same opinion, but was moved by the Judgments cited by Hale: But it was agreed that the best pleading were to say that no Goods came to his hands, except such and such, if any did, and shew how he administred them: And by perswasion of the Court the Demurrer was waived, and the parties pleaded to Issue.

Simmons & alii were indicted for a forceable detainer of the Lands of one Egerton, within the County Palatine of Chester, and restitution granted there: And now the Indictment being brought hither by Certiorari, it was moved, that their Jurisdiction there is exclusive, save only in case of Treason, or Writs of Error; and therefore the proceedings here would be coram non Judice; and the Court doubted what should be done, because no privilege is returned, and restitution was awarded below after the Indictment removed. But after Bacon openly declared, that so far as Indictments upon the Statute of 8 H. 6. ought to be taken before Justices of the Peace; and the Justices of Peace, as well in Chester as elsewhere, by the Statute of 27 H. 8. cap. 5. & 25. ought to be made by Letters Patents under the Great Seal, their proceedings there, quatenus Justices of the Peace, are subject to the Jurisdiction of this Court. And the Indictment was, that Egerton was seised of the Land, ut de libero tenemento pro termino vite sue, & seisinam suam predictam continuavit, quousque the said Simmons & alii pacifice intraverunt supra possessionem suam existent' liberum tenementum suum, & eum ad tunc & ibidem vi & armis dissesiverunt, contra pacem Domini Regis, & contra formam Statuti, &c. And exceptions were taken to the Indictment.

1. Because it did not conclude contra coronam; &c. but only contra pacem.

2. Because it is not said ad tunc existent' liberum tenementum, and that is not supplied by the intendment of the words dissesiverunt; but those exceptions were disallowed.

3. It concludes contra formam Statuti, where it ought to be statutor' for the Statute of 8 H. 6. cap. 9. is relative to the Statute of 15 R. c. cap. 2. and recites it, and then the words are joyned thereto, the Case of peaceable Entry, and forceable Detainer; and so this Statute is but supplemental of the other:

But to this it was answered, that this Statute first recounts the defects of the Statute of 15 R. 2. and then confirms it; and after provides for the case of peaceable Entry and forceable Detainer, to which the Statute of 15 R. 2. did not extend; so that as to this clause it is a new distinct Law, and consequently the Indictment good.

But to that it was replied, that the Statute 8 H. 6. goes on and provides, that in case of forcible Detainer, after complaint made to the Justices of Peace, they shall cause the Statute of 15 R. 2. to be duly executed; by which Statute the Offendor is to be fined and imprisoned; so that this Statute grants only restitution, and refers the other punishment to the Statute of 15 R. 2. So then upon this Indictment contra formam Statuti, taking it to be that of 8 H. 6. as it must be, the Offendor cannot be punished within that of 15 R. 2. And so the King should lose his Fine. And for this cause, after several debates, Roll held the Indictment insufficient, but Bacon contra, because the ancient Precedents both of Indictments and Actions upon the Statute, did use to recite this Statute only; but now the course is according to my Lord Coke's advice, Co. 4. 486. not to recite the Statute, but conclude it contra formam Statuti: Vide Dalton cap. 129. And he said it would be very mischievous to subvert so many Precedents as have been this way; but the best way had been to have writ it Statut' with a dash, for then it would have stood as by Law it ought.

4. It was excepted, that the Indictment is quod pacificæ intraverunt, &c. eum adtunc & ibidem vi & armis disseisiverunt. And for this cause, after much debate, (this exception being at first allowed) for the repugnancy; the Indictment was quashed, and re-restitution awarded, nisi causa ostensa sit in contrar' initio proxim' Termini.

Doctor Bruce's Case.

Habeas Corpus.

UPON a Habeas Corpus D^r. Bruce being returned committed upon the Stat. of 1 Mar. ca. 3. for disturbing the Minister of Maidstone in Kent, lawfully authorized, in his publick Prayer and Preaching; it was agreed, that that part of the Statute of 1 Mar. which concerns disturbance in Preaching, is not repealed by the Statute of 1 El. but as to disturbance in Prayer it is. And the commitment for both is naught: And for this and other gross faults in the return he was discharged.

Samuel

SAmuel Hall was found dead before the Coroner, that he passing a Bridge between Worthington and Billingsford in Comitatus Hertf. by reason of a breach in the Bridge fell into a River, where he was drowned; and that the Bridge is in villa de & in magno decasu by default of the Inhabitants there: and it was holden, that the Coroner may find such a nuisance as occasions the death of a man; and that the Township should be amerced thereupon; but because it was not found here that the Town was bound to repair the Bridge, the Indictment was quashed as to that.

Pasc. 24 Car. Banco Regis.

Rose versus Spark. Hil. 22 Car. Rot. 29.

IN an Action of Debt upon an Arbitrement for 7 li. 10 s. the Arbitrement. Plaintiff declares, That whereas there were certain Controversies between the Plaintiff and the Defendant touching a Wine-license, and the arrears of Rent issuing out of certain Land, they did submit them to the Arbitrement of J. N. and J. S. super quo præd' J. N. & J. S. accepto super se mod' arbitrand' de præmissis, intellexerunt quod restabant debita to the Plaintiff, quindecim librae de quibus quidem 15 li. ordinauerunt, that the Defendant should pay 7 li. 10 s. to the Plaintiff, in satisfaction of 7 li. 10 s. parcel of the said 15 li. and should assign the Wine-license to the Plaintiff, per quod actio, &c. And after a Verdict for the Plaintiff upon nil debet, it was moved Termino Paschæ 23 Car. & Termino Hil. 23. And again this Term.

1. That the Award is not of the thing submitted, for the submission is special of the arrears of Rent and a Wine-license: And the Arbitrators find the Defendant indebted in 15 li. but it appears not for what he was so indebted, so that it might be for some other cause than for Rent; therefore the Plaintiff ought to have averred that the Debt was for the Rent, or at least to have laid the Award to be de præmissis, which perchance would have supplied it; but this exception was disallowed, for the Award

being general ought to be intended according to the undertaking, which was *de præmissis*; and this Intendment is confirmed by the Verdict: And it was said that the words *de præmissis* in pleading Awards, hath been used but of late time; but to good purpose to apply the general words of the Award proportionable to the things submitted: Also the words *super quo* help the Intendment.

2. (Which was the principal exception) It was moved, that the Award was void, for that the Arbitrators recite 15 li. to be due to the Plaintiff, and award that the Defendant shall pay 7 li. 10 s. in satisfaction of 7 li. 10 s. parcel of the Debt, and shall assign the Wine-license; but this is not said to be in satisfaction of the residue, so that here remains 7 li. 10 s. parcel of the Debt not satisfied nor discharged; and Roll was of opinion, and that as to the Assignment of the Wine-license that the award was void: But Bacon held, that it should be intended in satisfaction of the other 7 li. 10 s. But both the Judges agreed, that forasmuch as the submission was not with an *ita quod*, &c. the Award as to the parcel was good according to the Books. Co. 8. 98. d. 19 H. 6. 6. h. 22 E. 4. 25. g. and so Judgment was given for the Plaintiff. Note here, though the submission were of the Rent and a Wine-license, the Award was only of the Rent, which could not have been alone submitted.

Hart *versus* Buckminster. Hil. 23 Car. Rot. 225.

Debt.

IN an Action of Debt upon a Bond with Condition, reciting, That whereas the Plaintiff had carried 12000 Billets for the Defendant to Dartmouth, if the Defendant should pay the Plaintiff after the rate of 17 s. per 1000. then the Obligation should be void; the Defendant upon Oyer thereof pleaded, that the Plaintiff did not carry 12000 Billets to Dartmouth; and upon Demurrer Judgment was given for the Plaintiff, for the Defendant is estopped to deny it.

Hobson

Hobson *versus* Wills.

IN an Action of Debt brought by an Administrator, the Plaintiff declares of Letters of Administration granted to him per Carolum Regem, &c. without saying debito modo, &c. And upon a Demurrer to the Declaration it was adjudged good, because the King hath universal Jurisdiction here.

Bamfield *versus* Brown.

IN an Ejectione firmæ upon a Trial at the Bar evidence was given, that Sir John Brooke, Lord Cobham, sealed an Indenture of Lease of Black acre, Green acre, and White acre; and by Letter of Attorney reciting, that whereas he had made an Indenture purporting a demise of Black acre and White acre, (omitting Green acre) as by the same more at large appears, &c. gave power to deliver it as his Deed upon the Land, and also by word of mouth commanded the Attorney to do the same thing; and Roll inclined, that the Letter of Attorney was insufficient in respect of the omission; but Bacon contra clearly, because there is a description sufficient to shew it to be the same Lease; but both agreed that in Debt for Rent upon a Demise such a mistake in the Declaration were fatal, because there he takes upon him to recite the Demise upon Record as it was made upon a Contract, which being entire, an omission of part makes it not the same Demise, and the Action is founded upon it, but here he is only to describe it in pais; but they held that the party might deliver the Lease by virtue of the authority given him ore tenus, notwithstanding the Letter of Attorney; but then he must swear he did it by virtue of that, for if he did it by virtue of the Letter of Attorney, the other authority will not avail the delivery; and it was said that he could not deliver it by virtue of both authorities, quod quære.

Pas. 24 Car. Banco Regis.

Lawrence *versus* Kete and others.

Ejectione firmæ

IN an Ejectione firmæ upon Issue whether it were a Devise by Will in writing or not, between Mrs. Dunsh, Widow, and Edmund Dunsh the Heir: The Case upon the Evidence was, That Dunsh the Husband, being sick, said, that he devised all his Lands to his Wife for life, and limited several remainders of several parcels of them; and about an hour after wished and desired that one Kete were there to write his Will: whereupon the Wife, without acquainting her Husband with it, sent for Kete, who from the mouth of the Witnesses which heard the Devise wrote the same; but because they differed in their Testimony touching the limitation of the remainders, he wrote two Wills, and this was without privity of the Husband, who before the writing finished became senseless, and soon after died: And the original Writings were both lost, but a Copy testified to be of the same effect was produced; and after much Dispute it was agreed by the Court, and so given in charge to the Jury.

1. That an actual Devise by word is no sufficient ground for a stranger to write the Will, but there ought to be an Actual Will, and desire that it should be written, and a bare wishing is not sufficient, but there ought to be an actual willing.

2. That this desire ought to be in some short space after the Devise, so that it be as one continued act; for if the Devise be at one time, and at another time the Devisor sends for one to write his Will, a new Declaration will be necessary to make it effectual.

3. That an actual desire of the Husband, that Kete were there to write his Will, was a sufficient ground for the Wife to send for him, though the Devisor gave no express directions to doe it.

4. That

4. That the writing of the Will from the mouth of Witnesses was sufficient, and it need not be from the mouth of the Testator.

5. If Witnesses agree as to the Devise for life, the Will stands good for that, though they disagree as to the limitation of the remainders.

6. Though the Debtor becomes senseless before the Will be written, yet if it be written before he dies, it is a good Will in writing.

7. If a Will continue in writing at the time of the death of the Testator, though it be lost or burnt afterwards, it stands good; but if it be burnt at the time of his death, then the Devise is void. And the next day the Jury gave a Verdict against the Will, because the Evidence was not clear as to the desire of the Debtor to send for Kete, but there was a motion for a new Trial, upon pretence of partiality in some of the Jurors; sed non prevailuit.

Hill versus Armstrong. Hil. 23 Car. Rot. 931.

IN an Action of Debt upon a Bond, with Condition to Debt.
 I pay 300 li. to the Plaintiff, and to add 3 li. to every Hundred if it were demanded: The Defendant pleaded payment of the 300 li. and that he added 3 li. to every Hundred secundam formam conditionis prædictæ. The Plaintiff traversed the addition of 3 li. to every Hundred secundum formam conditionis prædictæ. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Plaintiff ought to have alledged a Demand: And for this cause Judgment was given against the Plaintiff; for this being matter of substance, without which the Plaintiff had no cause of Action, was not helped by the Issue nor Verdict, notwithstanding

standing the words *secundum formam conditionis*, which was pretended to imply a Demand.

Hill & Uxor' *versus* Bird & alios.

Letters of Administration of the Goods of Sir John Lamb, Intestate, were committed by the Prerogative Court to the Wife of Hill; being near to the Intestate; and upon a suggestion of a Suit there, by others of equal degree, for a distribution of the Goods of the Intestate, according to agreement made by the Administration, as was pretended, Hale prayed a Prohibition, and it was granted; for the Statute wills, that Administrator be granted to the next of kin for their advantage; and when the Ordinary, &c. hath once executed his power according to the Statute he cannot alter it, nor hath any power to compell the Administrator to make distribution notwithstanding the Agreement. And Hale said, that the Court there threatened to repeal the Letters granted, unless she would bring in a true Inventory of the Estate of the Intestate, and give a true account of her Administration; to which Roll answered, that the Court there may cite her to bring in an Inventory, and to give an account, but if it appear that they goe about to repeal the Letters for not doing of it, you shall have a Prohibition, which was not denied by Bacon. And Hale would have had a Prohibition against all the Cousins, as well those that sued there as others, because the proceedings there being ore tenus, the rest may joyn in the Suit when they will, but the Court denied to grant any Prohibition, quia timet, &c.

Pasch.

Pasc. 24 Car.

Creswell & Uxor *versus* Ventres & Uxor.
Hil. 23 Car. Rot. 969.

SLander. Thou didst, and dost buy, and didst receive stol- Slander.
len Goods; witness a Featherbed-Tike thou hast in thy
House, and the Cloath thy mans Clothes are made of. And I
will prove it. And thou didst know that they were stolen.

And after a Verdict for the Plaintiff upon the motion of
Wilde, That the words do not charge the Plaintiff with felo-
nious receiving. And though she knew that they were stolen,
this doth not argue that she was consenting to the stealing; for
she might come by them honestly and rightfully, as if they were
sold afterward in Market overt; Judgment was stayd. And
Roll said he had known Judgment arrested for the like reason.

Spatchurst *versus* Sir Mat. Minns. Hil. 23 Car.
Rot. 1407.

IN Debt by an Administrator for Rent reserved upon Assign- Debt.
ment of a terme of years in a House in St. Martins
in Campis, by Deed made by the Intestate. The Plaintiff al-
leges that the Defendant had enjoyed the House pro & durante
toto prædicto Termine, and for 90 li. due at 1643. Ter-
mino ad tunc nondum finito the Action is brought. And after
a Verdict for the Plaintiff, it was moved by Boreman, That
this reservation is not properly of a Rent, but of a Sum in
gross; and for a Sum in gross no Action lieth till the last day
of payment; now it doth not appear that the last day of
payment is past: For though it be alledged that the Defen-
dant hath enjoyed the House during the whole terme, this may
be not till after the Sute commenced.

2. That this being a Sum in gross and no Rent, seeing 7H.6.26.a.34.f
parcel only is demanded, the Plaintiff ought to acknowledge 4H.6.26.h.
the receipt of the residue, as upon an Obligation. And the 3H.4.caf.prim.
Case being twice moved, the Court did both times agree it to 20E.4.2.2.
be a Sum in gross, and no Rent properly, and that the Refer- 34H.6.2.2.
vation

vation ought to be by *Died.* 2. That it being a Sum in gross, no Action would lye till the last day of payment incurred; but yet upon the first motion a Rule was given that the Plaintiff should have his Judgment, supposing that it appeared in the Record that the whole terme was expired: For then they did agree that an Action would lye for the Rent due at one day; but after upon those two Objections the Judgment was stayed.

Nota, This Contract is in the Realty, and the Debt ariseth in respect of the Profits; and therefore it seems an Action will lye before the last day, and so is it ruled in 45 E. 3. 8. b. and admitted 14 H. 7. 2. h. And so Hale told me was his Opinion.

Leech versus Davys. Trin. 23. 1870.

Debt.

In Debt upon a Bond of 100 li. Condition that the Defendant should appear in this Court to answer in a Plea of Trespass commenced by the Plaintiff, and to satisfy the Damages he should recover. The Defendant pleaded the Statute of 23 H. 6. and that he was attached and in custody, and that the Bond was made for his Enlargement, and so not his *Died.* Whereupon the Plaintiff demurred specially upon the conclusion of the Plea, which ought to be Judgment *si action'*, &c. And therefore the Plea naught, and so agreed. Also it was agreed that the Statute doth not extend to a Bond made to the Plaintiff himself; and so Latch said it was adjudged 30 El. between Rayen and Stockden.

Bernard versus Bonner.

Eject. Firm.

In an Ejectione Firmæ of Lands and 200 Acres of Wood in Stagmore in Com' Middlesex, upon a Lease alleged to be made by the Earl of Rutland and Geo. Sutton Domin' Lexington and others; upon Not Guilty it was moved by Mainard upon the Evidence in a Trial at the Bar, That Sutton was no Peer of the Realm of England, but only an Irish Baron, and so not the same Demise; and the Case in Dy. 300. a. was cited; But it was answered and resolved by the Court, That

forasmuch as the Issue here is not whether G. Sutton Dom' Lexington did demise as it was in Dyer, where his Title is made parcel of the Issue, and therefore a failure, but here it is non cul. So that it is sufficient that it be the same person that did demise, though misnamed. And so it hath been resolved in the Case of a Demise alledged by Sir Ralph Euer, Dom' Euer, who was no Baron: And in another Case of a Demise alledged to be made per J. S. Dom' Sinclere, who was an Irish Baron, upon Not Guilty pleaded, &c.

And the Evidence proceeding, the Case was, That Sir Thomas Lake being seized in fee of the Premises, leyned a fine to the use of Sir Nich. Fortescue for 41 years, if Sir T. L. lived so long, the remainder to his Wife for life, the remainder to Sir Nich. for the life of T. L. with other remainders over; Sir Nich. granted the Land, & totum statum suum, to one Page and Ducke, &c. habendum for 60 years. And after Sir Nich. demised the same Lands to the said Page and Ducke, &c. by Indenture for 60 years, if Sir Tho. Lake junior, or his Wife, live so long; Page and Duck by Indenture reciting this last Demise, assign and grant the said Terme, habendum the Land & totum statum suum during the residue of the said Terme of 60 years to Sir Tho. Lake. And the Opinion of the Court was, That by the Grant of Sir Nich. his whole Estate, his remainder passed, and the habendum repugnant, because no other ceremony was requisite, he himself being Tenant for years. Then it was moved that there ought to be an Entry by him, but that was agreed not requisite; for the Statute executes the Estate actually; and such a Lessee may attorn before Entry; and the Case was the stronger, because his terme was not sufficient to satisfy the Grant for 60 years. Then it was doubted what effect the Assignment of Page and Ducke had, because the terme recited was a Lease by Estoppel for the Lessor only, for the Lessor then had nothing in the Land. And it was agreed in this Case, that if Lessee for Life accept of a Lease for years, this is a Surrender of his Estate for Life.

Hodson

Hodson *versus* Sir Anth. Ingram. Hil. 23 Car.
Rot. 968.

Debt.

In an Action of Debt upon a Bond with condition to perform Articles of an Indenture, which recited, that where certain persons were obliged to the Earl of Holland in eight Obligations, which the Earl had assigned to the Defendant to his own use, now it is agreed that the Defendant should assign the Obligations to the Plaintiff, to the Plaintiffs own use; And the Defendant Covenants that the moneys should be paid at the several days limited by the Bonds, or within eight days after. And the breach was assigned that the sum of 50 li. payable by one of the Bonds was not payd the Plaintiff upon the first of March, which was the day limited by the Bond, and Issue thereupon was found for the Plaintiff; and Hale moved in arrest of Judgment that the Replication was insufficient, for it might be paid within the eight days after; also that the Condition was for Maintenance, and so the Bond void, and Judgment was stayed.

Faldo & Pindar. Hil. 23 Car. Rot. 594.

Replevin.

In a Replevin the Defendant avowed for Rent-charge granted by fine sur concessit for the life of J. S. to the use of Tho. Faldo and his Assigns for the life of the said J. S. And the limitation of the use being traversed, and Issue thereupon joyned, upon a Trial at the Bar, the evidence was, that it was to the use of him, his Heirs and Assigns, for the life of J. S. And the Court directed that it should be found specially, for because the Freehold is intire, it may be a question whether it was the same Freehold.

Chap-

Chappel *versus* Goodhouse. Hil. 23 Car:

Rot. 1727.

SLander. You are a Bugging Rogue, go home and bug-ger another Mare. And after a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words would not bear an Action, because the Plaintiff is not charged with any act done. But the Opinion of the Court was, that the words would bear an Action, because they imply an act done. And Roll said, that where one said, Where is that long lock't, shagg-hair'd murdering Rogue? And a stranger asked him, who do you mean? He said, Greene of Faucet; the words were judged actionable: so he said, where one said, Bring home the Cushion you stole; the words were adjudged actionable. But the Judgment was stayed for further advice.

Dent *versus* Scott. Trin. 22 Car. Rot. 1151.

In an Action of the Case upon an Indebitatus Assumpsit for Wares, it was found by special Verdict, that the Wares were sold to the Defendants Wife for convenient Apparel, which she wore, and if, &c. And the Opinion of the Court was clear for the Plaintiff; for the Wife may charge the Husband for Necessaries, as Apparel, Dyet and Lodging, in case that the Husband doth not provide them for her: But if the Husband allow a stipend to the Wife for these things, and it be paid her, then they held she could not charge him. And Roll said, that this was endeavoured to be proved at the trial, and because it could not, he would have had the Jury found generally for the Plaintiff. And Bacon said, that he and the other Judges have lately certified the Lords in Parliament accordingly; but for a flaw in the Declaration which was in considerat' quod venderet & deliberaret, and no averment of any sale or delivery, Judgment was given against the Plaintiff, because the Declaration was insufficient, and so entered.

Note also that the promise in this Case is laid to be made by the Husband, and the sale and delivery made to him, but then it must be deliberasset, for if it

R

were

Acc'on sur
Case.

were in consideration quod venderet & deliberaret to him, then it may be questioned whether a Sale and Delivery to the Wife would make good the averment.

Dunsh versus Smith. Hil. 23 Car. Rot. 37.

Debt.

In an Action of Debt brought by an Executor for the arrears of a Rent-charge, upon the Statute of 32 H. 8. The Plaintiff declares that the Defendant in the life of the Testator did enter into the Land out of which the Rent was issuing, and occupied it, and took the profits thereof by the space of five years: and demands the arrears of the Rent for that time. And after a Verdict for the Plaintiff, Mainard moved that the Action will not lie for the arrears against the Occupiers, for the Statute gives it against the Tenants of the Land. To which Hale answered, That at the Common Law the Action lay against him that took the profits of the Land, and against the Husband that was seized in right of his Wife. C. 4. f. 49. 2. That this Action is given in lieu of a Distress; and the Heirs of the Occupiers were chargeable to the Distress. 3. That it would be convenient that the Plaintiff should be compelled to inquire out in whom the Estate was of right: But Judgment was stayed. And Roll doubted of the Case; but inclined against the Plaintiff.

Pasc. 24 Car. B. R.

Harvy versus Thorne. Pasc. 24 Car. Rot. 472.

Case.

In an Action upon the Case against an Executor, the Plaintiff declares, that upon a treaty of a Marriage it was agreed between the Plaintiff and the Testator, that he should pay to the Plaintiff 100 li. and whilst that should be unpaid, he should pay the Plaintiff 10 li. per Annum, which Agreement was made Anno 1618. And the Action was brought for all the arrears by the space of 28 years. The Defendant pleaded the Statute of Limitations, whereupon the Plaintiff demurred. And upon the motion of Hale (who advised the Attorney to

to bring the Action for all the arrears) that it appeared that all could not be barred by the Statute. Judgment was given for the Plaintiff, no Counsel being retained in the Cause for the Defendant.

Loder versus Hampshire.

IN Debt upon a single Bill of 50 li. the Defendant after ^{Debt.} Imparance pleaded, That after the last continuance the Defendant had paid the Plaintiff 5 li. parcel of the 50 li. and demanded Judgment of the Bill. Whereupon the Plaintiff demurred; and because the Defendant did not alledge that he had an Acquittance which he ought to produce. At the motion of Earle, Judgment was given against the Defendant, that he should answer over, &c. C. 5 E. 4. 139. a.

Dod versus Robinson. Trin. 23 Car. Rot.

SLander. The Plaintiff declares that the last of March, 13 ^{Slander.} Car. he was Instituted and Inducted into a Parsonage in Ireland, and executed the Office of a Pastor in that Church by the space of four years after; and the Defendant said of him, He was a Drunkard, a Whoremaster, a common Swearer, and a common Lyar, and hath preached false Doctrine, and deserves to be degraded. And after a Verdict for the Plaintiff, it was moved by Hale in arrest of Judgment, 1. That the words in themselves are not actionable, because the Crimes charged impute no Civil or Temporal damage to the Plaintiff for which he may have Action: But the Opinion of the Court was clear for the Plaintiff in that point; for that the matters charged are good cause to have him degraded whereby he should lose his Freehold, which is a temporal damage to him. Then it was objected, That he did not lay that he was Parson when the words were spoken. To which it was answered by the Court, That it should be intended he continued Parson, because he had a Freehold in the Parsonage during his life. But it was further urged, That inasmuch as he hath laid

a special time, during which he exercised the Office of a Pastor, it shall not be intended that he continued so longer then himself hath laid it: And of this the Court doubted, but inclined for the Plaintiff.

Morefield & Webb. Pas. 23 Car.

Rot. 51.

Action
Case.

In a Writ of Error upon Judgment in the Palace Court at Westminster. In an Action upon the Case upon a Promise, and a Verdict for the Plaintiff, It was moved for Error, that the Habeas Corpora Jurator was not returned served; but that there was a Panel of the Names of the Jurors annexed to it, which Case is aided by the Statute of 21 Jac. which aids, when there is not any return upon the Writs of Ven. Fac. Hab. Corpora, et Distring. so as a Panel of the Names of the Jurors be returned and annexed to the said Writs. And two Objections were made;

1. That this Statute extends only to such by Writ; and in this Court it is by Precept, and not by Writ.

2. It appears that this Court was erected by Letters Patents, 6 Car. which was after the Statute.

But it was resolved, 1. That it is within the Intention of the Statute which doth provide amendment in any Action, Suit, Plaint, Bill or Demand: And Roll said, that it is questionable, if this Statute extends to the Grand Sessions in Wales; and Justice Jones was angry that it was made a Question.

But it was agreed that the Statute of Jeofails, which doth provide amendment by Examination of the Clerks, &c. shall not extend to inferiour Courts in these points.

2. It was resolved that this Statute extends to the Courts made after, and so not within the Equity: And after upon good deliberation Judgment was affirmed.

Incipit

Inicpit Term' Trinitat. 24 Car. B. R.

Rolls only fate Judge this Terme, *Bacon* being sick.

Beaton *versus* *Forrest*. Hil. 23 Car. Rot. 355.

In an Action of Debt upon a single Bill, the Defendant ^{Debt} after Impar lance plead. d payment of part after the latter continuance, & petit quod billa cassetur, &c. the Plaintiff denied the payment, and the Defendant demurred. And it was resolved by Roll, that the Plea was insufficient, although pleaded in Abatement only, for that there ought to be an Acquittance; which is controverted in the old Books, where a difference hath been taken between such a Plea pleaded in Barr, and when pleaded in Abatement. Vide L. 5. E. 4. 139. 15 H. 7. 10. e. 3 H. 7. 3. g. 7 E. 4. 15. e.

But Roll said, if he had had an Acquittance he might have pleaded it in Barr or Abatement at his election. Then it was moved by Yard to have Judgment peremptory;

1. For that this Plea is pleaded after Impar lance.

2. For that the Plaintiff hath tendered an Issue upon the Defendants Plea, which he hath refused.

But it was resolved that the Plea was not peremptory.

For

1. When a Plea concludes in Abatement it is not peremptory, but if a Plea in Abatement be pleaded in Barr, it is peremptory. Dyer 228. n.

2. Though it be plead. d after Impar lance, and Issue tendered upon it, yet it is not peremptory upon a Demurrer. Hob. § 1. c.
34 H. 6. 8. d. In a Writ of Entry upon a Disseisin made to the Ancestoꝝ, the Tenant pleaded in Abatement that the Demandant himself was seized; the Demandant denied his Seisin, and concluded to Issue: The Tenant pleaded an Estoppel to the Demandant, which upon Demurrer was over-ruled, and yet not peremptory. Br. tit. Peremptory. But if Issue be joyned upon a Plea in Abatement, then it is peremptory. 50 E. 3. 20. J. Katesby et K. sa feme port assise, the Tenant pleaded that long time befoꝝe K. was married to J. C. &c. And that she is still the wife of J. C. and not the wife of the Demandant J. K. and demanded Judgment of the Writ, and Issue being joyned thereupon, the Tenant concluding to the Assise, the Demandants demurred as to the Trial,

§

viz.

By. 311. a.

Hob. 81. c.

viz. that it ought to be by the W.B. And it was awarded to be tried by the Assise. And the Demandant would have waived his Plea in Abatement, and have pleaded in Barr; the Marriage of K. with J. C. and a Release from J. C. but was not admitted, because the Issue made it peremptory to him. And so it is if after Issue joyned the Defendant pleads a Plea in Abatement, this is peremptory as well upon Demurrer, as upon trial by Verdict; because after Issue joyned, no Respondes ouster can be awarded; and with this agrees L. 5. E. 4. 139. where in Debt after Issue joyned, the Defendant at the Nisi prius pleaded payment of part after the latter continuance in Abatement; and the Jury being discharged, and the Plea adjourned in Banke, for that no place of payment was pleaded, the Plaintiff had Judgment to recover his Debt. And 2 E. 4. 10. the Tenant in a Cui in via pleaded the Entry of the Demandant after the latter continuance, and Issue being joyned thereupon, the King dyed, and upon a Resummons he pleaded a Recovery of part in an Assise after the latter continuance; to which the Demandant pleaded an Estoppel; and upon a Demurrer Judgment was given for the Demandant to recover Seisin. And Roll said, That if after Imparance the Defendant pleads a Plea in Abatement, which is waived by the Imparance, the Plaintiff must not Demurr, but move the Court that he may be compelled to plead in chief; but if Demurrer be joyned upon it, it is not peremptory to the Defendant, although the Demurrer be adjourned till another Terme, as it was in this Case, 22 H. 6. 55. c. And a Respondes ouster was awarded in the principal Case.

Nota diversitatem between a Plea in Abatement, and a Plea to have Aide; for if Issue be joyned upon a Prayer in aide, and found for the Tenant, the Judgment is only that he have Aide, 7 E. 3. 46. Vide Stat Westm 2. cap. 6. for Counterplea of Voucher, that if it be adjourned and adjudged against the Tenant, it is peremptory to him. 2. In. 242. c. 243. 8.

Prug-

Prugnell & Anne Goffe. Pasc. 24 Car. Rot. 217.

In a Writ of Error upon a Judgment in the C. B. in an ^{Error.} Action upon the Case, for that the Defendant in consideration of a Marriage to be had between the Plaintiff and her Daughter, promised to give 100 li. to the Plaintiff, and 10 li. for Apparel for her Daughter. And whereas the Defendant had a Shop in Basingstooke, with divers Wares in it, she promised to assign over the Shop to the Plaintiff, et transference negotiationem suam ang^l, her Trade, to the Plaintiff, and that she would not use her Trade any longer in Basingstooke; And breach assigned in not paying the Money nor assigning the Shop, and for that she used the Trade there still, &c. And upon Non assumpsit, a Verdict for the Plaintiff, and entire Damages given. And Twisden moved for Error, that the promise not to use her Trade was against Law, and void, and cited More's Reports, Pasc. 20 El. p. 182. A Bond that one should not use the Trade of a Mercer in Nottingham, is void; Vide simile Mor. Mich. 29 El. p. 284. et Hil. 44 Eliz. C. B. que est enter Mich. 42 et 43 El. Rot. 2217. entr' Geggot et Batchelor. A Bond with Condition that one should not use the Trade of a Haberdasher in Kent for four years, was holden void; Et Lib. 11. 53. b. et 2 H. 5. 6. And this was agreed by Roll for Law, who took these differences, that where a Bond or Promise restrains the exercise of a Trade, although it be as to a particular place only, yet if it be upon no consideration, the Bond &c. is void: But if there were a Consideration for the restraint, as if A. assign a Shop, or sell braided ware to B. there in respect of the apparent prejudice which may accrue to B. if A. should continue the Trade, such a Bond or Promise is good; and so was it adjudged in Froward's Case upon a Writ of Error out of Bridgenorth: But although there be such a Consideration, yet if the Restraint be general throughout England, it is void. Another Exception was, that the words transference negotiationem suam, were of an incertain signification, but not allowed; and so the Judgment was affirmed.

Trin.

Trin. 24 Car. B. R.

Freeborne *versus* Pincras. Hil. 23 Car. Rot. 1375.Acc'on for
Cafe.

In an Action upon the Case the Plaintiff declares that the Defendant in consideration, &c. did promise to joyn with him in a Surrender of certain Cophhold Lands for a Sale to be made of them to any person, and avers that he had procured 2 Cophholders such a day to be present at a certain place within the Mannor, and that the Plaintiff was then and there ready to have joyned with the Defendant in a Surrender of the Lands for a Sale to be made to one J. S. and that the 2 Cophholders were then and there ready to have received the Surrender, &c. and that then and there he did request the Defendant to joyn with him in a Surrender into the hands of the two Cophholders to be presented by them in Court, to the use of the said J. S. &c. Secundum consuetudinem manerij præd' à tempore quo, &c. usitat, quodque sursumredditio sic requisita facienda fuit pro venditione of the said Cophhold Lands, pro quadam pecunia summa per præd' J. S. solvend'; And that the Defendant non junxit with the Plaintiff in the Surrender, licet ad hoc faciend' postea eodem die per præd' querent requisitus fuit, &c.

And after a Verdict for the Plaintiff upon Non assumpsit pleaded, upon motion in Arrest of Judgment, it was resolved by Roll that the Declaration was insufficient;

1. For that the Plaintiff hath alledged that he was ready to joyn in a Surrender with the Defendant, and that then and there he did require the Defendant to Surrender, but hath not alledged that he did give notice to the Defendant that he was ready to joyn with him; and so it is no more then a bare request to the Defendant to make a Surrender, which is not sufficient, for that the Plaintiff was to joyn with him in it.

2. The Surrender was to be for Sale to be made to J. S. and the Plaintiff hath not any way intimated to the Defendant that the intention of the Surrender was such. And Roll said that the notice ought to be particular of the agreement and sum for which it was to be sold.

3. The Promise is general to joyn in a Surrender, and the Request is to Surrender into the hands of two Customary Tenants, which being a particular way of Surrender ground-
ed

ed upon a particular custome, is not within the intention of a promise generally to Surrender, which is to be taken according to the common way of Surrender; and so he said it was resolved Pasc. 9 Car. in this Court, between Sims and the Lady Smith. And so if a man be bound to another to make such assurance of Lands as the Obligee shall devise, it is not sufficient for him to devise a fine, and to take out a Dedimus, &c. upon it, and require his Conusans in that, for this is but a special way of taking the Conusans; and so he said it had been ruled: But if there were a Proviso that he should not go above five miles from his House, then if his House be above five miles from Westminster, he is bound to make his Conusans upon the Dedimus; and that he said hath been the difference.

4. He hath not positively alledged that there was a custome in the Mannor to Surrender into the hands of two Cophholders, which he ought to have done, but hath too superficially pleaded; And Judgment was given against the Plaintiff.

Trin. 24 Car. B. R.

Read *versus* Palmer. Pasc. 24 Car. Rot. 326.

In an Action upon the Case the Plaintiff declares, that ^{Acc'on for} whereas he had brought an Action of Battery against the ^{Cafe.} Defendant, and proceeded to a Trial at Guildhall, London, where a Jury was drawn by consent, and the Plaintiff and Defendant submitted the Cause to the award of two of the Jurors, *infra unum mensem proxime sequent fieri*, and that *postea eodem die* in consideration that the Plaintiff did promise to the Defendant to performe *omnia et singula quæ præd' arbitratores ex parte ipsius querent' de et super præmissis faciend' et observand' ordinarent et adjudicarent.* (And here the Plaintiffs Attorney after Issue joyned without notice, inserted *infra unum mensem*) the Defendant promised in the same manner, and the same Clause there inserted by the Plaintiffs Attorney. And after Verdict upon Non assumpsit, pleaded, this amendment after issue joyned without notice, was

was moved in arrest of Judgment, wherein the question was, whether this amendment were in a point material; for it was agreed that if it were not in a material part of the Declaration, then it could not prejudice the Plaintiff. And Twisden urged that it was not in a material part,

1. Because every submission to an Award implies a Promise to perform it; and so the promise laid is no more then was implied in the submission.

2. The Promise is to perform what the Arbitrators should award, which must be taken with relation to the submission, which was to an award to be made within a month. And so the words *infra unum mensem*, are but an expression of that which would have been implied without them. But it was resolved by Roll upon good deliberation, that the amendment was in a material part; for

1. Though a submission to an Award be good Evidence to induce a Jury to find a Promise to perform it, yet in Judgment of Law the Promise is collateral to the submission, and not implied in it.

2. Though the Promise be collateral to the submission, yet if it had been laid to have been made at the same time with it, then it should have been intended adequate and proportionable to it; but being laid to be made at another time, although it be the same day, it cannot be so intended, because it is not immediately applied to the submission, but it might have enlarged or abridged the time limited thereby. And he cited a Case between Hodge and Vavasour, 14 Jac. where the Plaintiff declared, that the Defendant such a day became indebted to him for Mares, and in consideration thereof, *postea eodem die*, promised to pay it: And this was ruled good, not as a promise in Law, but as an actual promise raised upon a consideration continuing; which he cited to shew that a little distance of time (though the same day) alters the intent of Law, and a new Trial was awarded.

Trin.

Trin. 24 Car. B. R.

Chace *versus* Gold. Pasc. 24 Car. Rot. 219.

In an Action of Debt upon a Bond of 200 li. with Condition for the payment of 104 li. at a day certaine, made by the Defendant, and two others jointly and severally. The Defendant upon Oyer and Entry of the Bond and Condition in hæc verba, pleaded, that the Plaintiff did release præd' scriptum obligatorium, by the name of an Obligation in 200 li. per solutionem of an 100 li. And averred that no other Bond was made by the Defendant, and the two other persons to the Plaintiff, besides that Bond, whereupon the Plaintiff demurred; and upon debate Judgment was given by Roll for the Plaintiff; for the Release of a Bond of 200 li. for the payment of an 100 li. doth not discharge a Bond for the payment of an 104 li. for though a greater sum includes a lesser, as to a tender, yet the Debt and Duty is intire, and therefore cannot be discharged by a Release of a lesser sum. And though it be said positively, that the Plaintiff did Release præd' scriptum obligatorium, yet the words per nomen doth declare the manner how the Release was made, and it appears to the Court now that in truth the Bond was not released; and it was agreed that the Averment in this Case was foreign and idle, and could not make good an insufficient Release. Vide 10 E. 3. 7. In an accompt against one as Receiver by anothers hands, the Defendant pleaded a Release by the Plaintiff of all accompts which he might have against the Defendant of all manner of Receipts. And the Dect was of all manner of Receipts from the Plaintiff himself, and ruled a good Release. And note the reason, because a Receipt by anothers hand is a Receipt from the Plaintiff himself.

Release.

Lib. 2. 67. Dy.
cr 98. f.

43 E. 3. 31. g.

Ellis versus Box. Hil. 23 Car. Rot. 973.

Debt.

In an Action of Debt upon a Bond of 200 li. with Condition, reciting, that whereas the Plaintiff and one Hawes were bound in another Bond to performe certain Covenants in an Indenture; if the said Hawes should perform the Covenants in that Indenture; and also if the Defendant should save the Plaintiff harmless of that Bond, then the present Obligation was to be void. The Defendant upon Oyer of the Condition, pleaded that Hawes had performed the Covenants in the Indenture, and that he had saved the Plaintiff harmless of that Bond. And upon a general Demurrer, it was resolved by Roll that the Plea was insufficient in substance, both because the Covenants in the Indenture were not set forth, and some of them might have been in the Negative, &c. And also because he hath pleaded, that he saved the Plaintiff harmless, without setting forth how he did it; and so Judgment was given for the Plaintiff.

Trin. 24 Car. B. R.

Drue versus Thorne. Pasc. 24 Car. Rot. 605.

Acc'on fur
Case.

In an Action upon the Case upon two Promises, 1. That the Defendant did accompt with the Plaintiff for divers sums of Money due to the Plaintiff by the Defendant, and upon that accompt was found Indebted to the Plaintiff in so much Money, &c. The second was, that the Defendant was indebted to the Plaintiff in so much for wares bought by the Defendant. Upon Non assumpsit pleaded, the Jury, as to both Promises, found that the Wife of the Defendant, being Sole, was Indebted to the Plaintiff for wares. And that after Marriage with the Defendant, he and his Wife did accompt together with the Plaintiff for the Moneys so due, and upon that Accompt 9 li. 13 s. 3 d. was found due to the Plaintiff, which the Defendant promised to pay, and if for the Plaintiff, &c. And Windham argued for the Plaintiff.

1. That

1. That the Debt of the Wife is the Debt of the Husband, and he is to be charged in the Debet and Detinet.

2. That the accompt of the Husband hath made it his pro-^{Hobart 88. c.} per Debt; but he agreed the Book of 9 H. 6. 11. c. where an ^{20 H. 6. 4. c.} Executor accompted with the Receiver of the Testator, that the Action ought to be brought in the Detinet, because he recovers in right of the Testator. And though in this Case the Wife joyns with the Husband in the accompt, it doth not alter the Case; for the accompt is the accompt of the Husband only, for a feme covert cannot be charged upon an accompt, though she may assign Auditors. 10 E. 4. 8. d.

3. The Jury have found an express Promise of the Husband, in respect of which he alone may be charged.

Mainard contra. 1. If the Consideration found by the Jury be different from that in the Declaration, then it is not the same Promise the Plaintiff hath declared upon. For the Objections,

1. The Husband is not charged in the Debet and Detinet, because the Husband is Debtor; but because the Husband and Wife are but one person in Law.

2. The Accompt doth not alter the nature of the Debt, but only reduceth it to certainty. See for this 16 E. 4. 8. d. 10 H. 6. 24. g. 11 H. 6. 17. h.

3. The Action is brought upon a Promise in Law, and not upon the express Promise of the Husband; but if the Promise had been Collateral, as in consideration of forbearance, &c. and the Declaration pursuant, the Action against the Husband only would have been good.

Lastly, The Verdict without question doth not warrant the second Promise, which is for Wares bought by the Defendant, whereas the Jury finds them to be bought by the Wife of the Defendant, dum sola fuit, and they conclude to both Promises, so that if either of them be not made good by the Verdict, it is against the Plaintiff. And Roll agreed in all things with Mainard, and Judgment was given against the Plaintiff.

Trin. 24 Car. B. R.

Oates & Aylett, &c. Trin. 24 Car. Rot.

Error.

In a Writ of Error upon a Judgment in C. B. in Trespass of Assault and Battery against four persons; after a Verdict, upon Not Guilty pleaded, it was assigned for Error, that one of the Defendants being within age, appeared by Attorney; and the only question was, Whether the Judgment should be reversed against all, or only against the Infant. And it was argued that the Judgment ought to stand for the rest, upon this difference, that where a Judgment is erroneous against one Defendant, and the same Action would not lie against the other only, there it should be reversed against all, as in conspiracy against two, &c. which lieth not against one only, but where the same Action would have been good against the other Defendant only, there the Judgment ought to stand against him. And 5 E. 4. 7. a. cited, that if Judgment in Trespass be given against three, the one of which was dead, the others shall not have a Writ of Error upon that Judgment, but only the Executors of the party deceased.

a R. 3. 1. b.

But it was resolved by Roll, that the Judgment should be reversed against all, because it is one and entire; and accordingly divers Presidents were cited by him, Trin. 14. Car. between Scudamore and Scriven, &c. in Trespass against three, one died, hanging the Writ, and Judgment against all three was entirely reversed, against the Book of 5 E. 4. which was denied for Law. And 12 Jac.

Judgment in a Formedon de uno crofto et messuagio was wholly reversed, because a Præcipe lyeth not de crofto, & Pasc. 18. Car. between Crocwell and Norefeld in Error upon a Judgment in Canterbury, in an Action of the Case upon two Promises, where upon a Verdict for the Plaintiff, damages were taxed severally, and because one of the Promises was insufficiently laid, the whole Judgment was reversed. Vide Hobart between Miles and Jacob. et 2. In. 236. d. And Trin. 11 Car. between Ellenhead and Dearman in Error upon a Judgment in the Marshalsea, in Debt upon a Bill, and likewise upon a Contract, The Defendant pleaded Non est factum to the one, and

and Nil debet to the other, and both being found against him, the Judgment was Quod capiatur; and because it was not Quod in misericordia also as to the other Issue, the whole Judgment was reversed. And Trin. 7 Jac. B. R. Rot. 568. between Beard and Beard in the very same Case with the principal Case, the entire Judgment was reversed: But in an Action at Common Law, where damages are given by Statute, there if the Judgment be Erroneous as to the damages, the principal Judgment shall stand, as in a Writ of Dower; and so he said it was adjudged between Tie and Atkins. Vide 22 E. 4. 46. e. et L. 5. 59. a. Simile in a Quare Impedit.

And the entire Judgment was reversed in the principal Case: Hale for the Plaintiff in Error; Wilde for the Defendant. And Hale cited a Case between Holland and Leo, called Damnis Case, where he in Remainder in Tail in a Writ of Error to avoid a Common Recovery, assigned for Error, that the Voucher being an Infant, appeared by Attorney; for which the entire Judgment was reversed.

Nota, Hoddesd's Secondary told me the Case of Miles and Jacob in Hobart was not Law.

Trin. 24 Car. B. R.

Cornish *versus* Cawfy. Trin. 23 Car. Rot. 1434.

In an Action of Debt against an Executrix, the Plaintiff Deb. declared upon a Lease made to the Testator by Indenture dated the 25 of March, Anno. Habendum à die datus for Seven years; And upon Nil debet pleaded, the Jury found that the Plaintiff by Indenture dated the 25 of March, and delivered the same day, demised the Land to the Testator, which was to have and to hold from the day of the date, for the term of Seven years from henceforth next and immediately following, &c. And upon this Verdict the Question was, Whether the Lease, in point of Computation, was to commence from the making, or from the day of the Date; For if the Seven years commenced from the making, then the Plaintiff had mistaken the Lease; but if they commenced from the day of the Date, then he had declared right, according to the Lease. And it was argued, that the Seven years were to commence from the day of

of the Date, and not from the making of the Lease, for that the words will bear that construction; for the words from hence forth may refer to the words from the day of the Date, and so to the time of the commencement in point of interest. And then the words shall be taken as if the Lease had been to have and to hold from the day of the date from henceforth for Seven years, excluding the day of the Date in the computation, and this was probably the intention of the parties; and not that the Lease should commence one day in point of computation, and the next day in interest: Also there is a Rent reserved during the term payable annually upon the 25 of March, the last day of payment whereof would be out of the term, if the Seven years commence upon that day. And the Case in *Dyer* 261. was cited, where an Abbot made a Lease for 31. years, and after made a new Lease in these words, *Noveritis nos &c. dictis 31. annis finitis et completis dedisse, & concessisse præd' præmissa (to the second Lessee) habend' et tenend' à die consecrationis præsentium (termin' præd' finit') usque ad finem termini 31. annorum tunc immediate sequentium.* And it is there resolved by all the Justices of C. B. that the Lease doth not commence in point of computation, till it takes effect in Interest, viz. till the first 31. years ended. And yet there it might have been said, that the words *præd' termino finito* should be a limitation in point of Possession or Interest; and the words *à die consecrationis &c.* in point of computation. But there it is said, that the words, *à die consecrationis*, refer to the Demise after the 31. years ended, to have *à die consecrationis*. But note in that Case the Opinion of the Court of the Kings Bench was against that Opinion. And in this Case two other points were moved and agreed by Roll;

1. That where part of the Arrears demanded were due in the time of the Testator, and part after his decease, the Action in the Detinet was good for the whole, as well as if all had been due after the death of the Testator. And that after a Verdict, *Quod non detinet*, the Land shall not be intended of any value, as it is well known in these times, in many places Lands have been of no value, and yet the Executor is liable to the Rent as far as he hath Assets; and clearly if he hath Assets he cannot waive his term.

2. That the Action being in the Detinet, and the Defendant pleading *Nil debet*, it is holpen by a Verdict. And so it was adjudged, as he said in this Court, Trin. 10 Car. Rot.

1289. between Porter and Gervise. And he said, If in an Action upon the Case upon an Assumpsit, the Defendant plead Not Guilty, it is well enough after a Verdict, and as there your Action is placitum trñs super casum, so here it is placitum debiti.

As to the principal point, he did resolve, That the Plaintiff hath mistaken his Lease; for a Lease Habendum, from henceforth, includes the day of the making; and a Lease Habendum, from the day of the date excludes the day of the date. And with this agrees Barwick's Case, which he affirmed to be Law; (but he said, That if such ancient Patents be given in Evidence, the Jury by presumption to make the Patents good, may find that they were made the last instant of the day of their Date, and then they are good in Law: And so hath it been resolved in point of Evidence.) Now the Habendum being à die datus, and for Seven years from henceforth, &c. to make all parts of it stand, it must be construed to commence from henceforth, viz. as to the computation of the Seven years, that they shall begin upon the 25 of March, and from the day of the date, viz. upon the 26 of March in interest and possession. And he resembled it to the Case of More and Musgrave, Hobart 18. which was cited by Hale, who said he had seen the Record of it, and it is entred Mich. 10 Jac. rot. 76. in Scacar. where the Plaintiff in an Ejectione firmæ declared, that J. S. 5 Maij 10. Jac. Demised a House to him Habendum, from the feast of Annunciation last past, for 21 years extunc proxime sequent. And the Defendant the same 5. of May ejected him, and upon Non cul. the Jury found that the said J. S. the said 5. day of May, by Indenture bearing date the 4. of May, demised the House to the Plaintiff, To have and to hold from the feast of the Annunciation last past, for and during the term of 21 years, next ensuing the date hereof, fully to be compleat and ended. And upon that Verdict the Plaintiff had Judgment, which was affirmed there; also in which case the term began from the feast of the Annunciation in computation of the 21 years, and upon the 5. of May in point of Interest. But Roll agreed that if in the principal Case the Lease had been made To have and to hold from the day of the date from henceforth for Seven years, then the Plaintiff had declared right. And Judgment was given against the Plaintiff: Hale for the Plaintiff, Twisden for the Defendant.

Trin. 24 Car.

Ward & Prin. Pasc. 24 Car. Rot. 169.

Error.

In a Writ of Error upon a Judgment in C. B. in an Action upon the Case, wherein the Plaintiff declares, That whereas one John Ward, the Plaintiffs Chancild, by the consent of the Plaintiff, was put to the Defendant to serve him, being a as his Clerk. And that the Defendant was to find him meat, drink, and lodging, &c. And that the Plaintiff thereupon had given 30 li. to the Defendant, and had agreed to give 30 li. more in consideration that the Plaintiff, at the special Request of the Defendant, would give consent that the said John Ward should depart out of his Service. And that the said John Ward should depart his Service, the Defendant promised to pay to the Plaintiff 15 li. &c. And upon Non assumpsit, a Verdict for the Plaintiff. And it was moved for Error, that there was no Consideration for the Promise, but the giving of the Plaintiffs consent that J. W. should depart; and he might have departed without his consent; but it was disallowed: For the Relation of the Plaintiff to J. W. and the Charges he sustained in placing him with the Defendant, shew that his Interest was so great in him, that in all probability the Plaintiffs consent was an effectual means to cause J. W. to depart from the Defendants Service. And the Case of Grisby and Loher in Hobart was cited, where the Mothers consent that her Daughter should marry the Defendant, was a good consideration of a Promise to the Mother. And the Judgment was affirmed. Hale for the Plaintiff in the Writ of Error.

Surry.

Prigg was Indicted that legitime electus fuit decennarius, Angl Deadborough of the Ville of D. & non præstitit sacramentum suum, before any Justice of Peace to execute the Office, sed voluntarie & obstinate, abstained from it. And it was agreed by Roll, that one may be Indicted for not taking his Oath in such case; but then he ought to be warned to appear before a Justice of Peace, there to take his Oath; and for want of that, and for that it did not appear how he was

was chosen Headborough, the Indictment was quashed. And afterwards upon motion a Writ was granted out of this Court directed to him, commanding him to go before some Justice of Peace to take his Oath, &c.

was Convicted of Perjury by Oath, for swearing he was Servant to J. S. where in truth he was only Servant to the Servant of J. S. And for this Oath Roll fined him 10 li. though Wilde moved for an Absolution, for that it was not malicious; and said, that one Tiler in this case was fined but 5 li.

Newton & Uxor *versus* Weekes & Uxor. Hil. 23
Car. Reg. 1470.

In an Action of Covenant upon an Indenture made by the Covenant.
Late Defendant, whilst she was sole, to the Plaintiff of the Plaintiff, whereby she reciting that she was seized in fee of certain Lands, in consideration of a Marriage to be had between the Plaintiff and her Son, did grant to the Plaintiff a Rent-charge out of those Lands to have after the death of her Son, and Covenanted to pay it, &c. The Defendants pleaded that they had nothing in the Land at the time of the Grant, but that a stranger was seized of it. And upon Demurrer it was adjudged for the Plaintiff, both because the Defendant is estopped by the Deed, and that the Covenant extends to it as an Annuity; *absque argumento ad motionem* Mrs. Prestwood.

South.

Southcote *versus* Southcote. Hil. 23 Car. Rot. 1173.

In an Action of Debt upon the Statute of 2 Ed. 6. the Plaintiff sets forth that he was proprietarius decimarum garbarum & feni, &c. And that the Defendant did sow certain Land containing so many Acres in that Parish with grain, and after mowed it, and carried away the Grain, not setting out the tenth part. And after a Verdict for the Plaintiff, upon Nil debet pleaded, it was moved in arrest of Judgment,

1. That the Plaintiff hath entituled himself as proprietarius decimarum garbarum, and demands for Tithes of Grain in general, whereas Garbarum is a word of incertain signification; and divers sorts of Grain are not wont to be bundled up as Rape-seed, Mustard-seed, and Cummin-seed, which us'd to be threshed out in the field.

2. He demands for Tithes of Grain in general, which is too incertain, for that there are several sorts of Grain.

But it was resolved, 1. That Garba in its prime and proper signification is intended of Corn: And so Roll said it was resolved, 1. In Baxter's Case upon Consultation with the Civilians, where one upon a Grant of Decimas garbarum, would have had Tithes-hay; but they did agree that the word in its Latitude did comprehend any thing that useth to be bundled, as wood, &c. but the ambiguity of the word here is taken away by the Verdict, and is to be intended of Grain that is Garbable.

2. The word Grain is certain enough, for that it is expressed to be sown upon a certain number of Acres. And here is not a demand of the thing it self, but Damages for it; and all prebial Tithes are within the Statute. And this Exception was over-ruled in the great Case, Coke Lib. Intra 162. cited 2. In. 650. And Roll said the same Exception was taken in Goldsmith's Case, Trin. 10 Car. Rot. 893. B. R. but the Roll being seen in that Case, the Verdict was not entered. And Roll gave order that the Judgment should be entered for the Plaintiff; but after directed it might be respited till next Term: But after the Judgment was entered, and a Writ of Error brought in the Exchequer, but I think it was for delay only.

Term. Mich. 24 Car. Banco Regis.

Udal *versus* Udal.

IN a Trover and Conversion of 400 Load of Timber : Upon not guilty pleaded, the Jury found by special Verdict, that Sir William Udal being seized in fee of the Manor of Horton, whereof the Land where the Timber grew was parcel, did Covenant by Indenture to levy a Fine to the use of himself in Tail, the Remainder to such persons and for such Estates as he should limit by Indenture, and for want of such limitation, the remainder to the Defendant for life, the remainder to his eldest Son in Tail, and to his tenth Son, and for want of such Issue, the remainder to W. U. for life, the remainder to his eldest Son in Tail, &c. and so to his tenth Son, the remainder to the right heirs of Sir William, with a Proviso that upon tender of 5 s. &c. he might revoke those uses and limit others, and levied a fine accordingly. And after by another Indenture reciting the uses of the first and the Proviso in it, made a new limitation to the use of himself in tail, the remainder to the Defendant for life, with like remainder, ut supra, to his Sons, the remainder to W. U. for life, with like remainders to his Sons, the remainder to the Plaintiff in Tail, &c. according to his power and the clause in the said Indentures, and dyed without Issue, and the Defendant (neither himself nor W. U. having any Son) cut down the Timber and --- years after sold part of it, and the Plaintiff seized the rest, which the Defendant did take again from the Plaintiff, and sold the same, and if, &c.

And (the case being argued Trin. Pasch. ult. and this Term) it was resolved by Bacon and Roll. 1. That if there be tenant for life, the remainder for life, and tenant for life cut down Timber trees, he that hath the Inheritance may seize them, although he cannot have an Action of waste during the life of him in remainder ; For 1. The particular tenant hath not the absolute property in the Trees, but only a special Interest in them so long as they continue annexed to the Land. And therefore a Termor cannot grant away his term excepting the trees, but the exception is void, for that he cannot have a distinct interest in them but only relative to the land. And so it

is resolved in Sanders Case Lib. 5. 12.f. (and so Mainard said) it was resolved 10 Car. in Whites case, in the Court of Wards, in case of lessee for life; but where a Lease for years was made without Impeachment of waste, such an exception was adjudged good (as he said) in Sir Alan Piercy's Case, and so Bacon said it was adjudged 9 Car. in Dame Billingslys Case. Then the remainder for life betters not the interest of the tenant for life in the Trees, but only is an impediment for the time to the bringing of an Action of waste; and therefore after the death of him in remainder for life, an Action will lye for waste done in his life time. And so it is adjudged in Pagets Case, Lib. 5. 76. g. and so (Mainard said) it was adjudged, Mich. 14 E. 2. in a Case not Printed, that where he in reversion upon an estate for life granted his reversion for life, and the tenant for life made waste, and then the grantee of the reversion dyed, that an Action of waste would lye against the tenant for life, which proves that the cutting down of the Trees by the Tenant was tortious.

2. It was resolved that the mean remainders in contingency, though of an estate inheritance, alter not the case, for an estate in contingency is no estate till the contingency happen: And therefore it was agreed that the Plaintiff might have had an Action of waste in this Case, had there not been a remainder for life in esse, notwithstanding the mean contingent remainders.

3. It was resolved that a Trover and Conversion in this Case would lye for all the Timber trees though the Plaintiff never seized parcel of them, for by the cutting down of them an absolute property was vested in the Plaintiff, unless they had been cut down for reparations and so employed in convenient time. And for this Bury and Heards Case was cited by the Court, which commenced in this Court 20 Jac. and depended seven years, where a stranger entred into Lands leased for life and cut down Timber trees and barked them, and the lessor before seisure brought a Trover for the bark and had Judgment to recover, notwithstanding that the cutting down and barking was all at one time; whereupon it was then objected that the distinct property of a chattle was never settled in the lessor, and the book of 13 H. 7. 9. g. cited, that Trespass vi & armis doth not lye against lessee for years who cuts down Timber trees and sells them. Per Curiam.

Which Case was then affirmed for good Law, but there it was agreed, That if lessee for years cuts down Timber trees
and

and lets them lye, and after carries them away, so that the taking and carrying away be not as one continued act, but that there be some time for the distinct property of a divided chattle to settle in the lessor, that an Action of Trespals vi & armis would lye in such case against the lessee. And that in such case felony might be committed of them, but not where they were taken and carried away at the same time. Vide 3 In. 109. a. c.4. 63.f. And it was resolved in that Case of Bury and Heard, that although the lessee had a special Interest in the trees as for necessary reparations, &c. yet the Action would lye for the lessor, for the Interest of the lessee was determined by the cutting down, unless he had cause for necessary reparations, which had there been, yet might the lessor have his Action; but if the lessee in such case had brought his Action and recovered, this would have been a good bar against the lessor: but in the principal case there was years distance between the cutting down and the sale. And also the Defendant by the sale made himself an absolute wrong doer, for though there had been cause for reparation, yet the Trees being cut down and sold, though other Trees had been bought with the money and employed in reparations, this would not have excused him in an Action of Waste.

And an exception was taken by Latch to the execution of the power of Sir William upon the limitation of the uses by the last Indenture, for that it was made with relation to the Proviso. And five shillings were not tendered, which was the Condition of the power thereby reserved, and then Sir William being tenant in Tail, the reversion to himself in fee, by the first Indenture, and dying without Issue, the Defendant being his heir was seised in fee; but the exception was clearly disallowed, both for that he had a double power by the first Indenture, the one to limit other uses to such persons and for such estates as he pleased, the other to revoke the uses limited by the first Indenture, and to limit new uses. And when he limits uses generally which cannot stand by the power reserved by the Proviso for lack of tender, the Law will refer the limitation to the power he had to limit other uses, &c. And Sir Edw. Clears Case, Lib. 6. 18. was cited. And secondly, for that the second limitation is expressly made according to his power, which refers to that power which he pursued: And it was touched whether the uses limited according to that power were revocable by the Proviso. And Mainard said it might be
a questi-

a question. And Judgment was given for the Plaintiff. Mainard for the Plaintiff and Latch for the Defendant.

Quære in the case cited if a lessor should bring Trover against a stranger for Trees cut by him, if this should be a bar to an Action of Waste for the Trees. And if there were cause for reparations, what remedy hath the lessee for his loss, for it should seem that he will be liable to an Action of Waste for not repairing, although the lessor recovers for the Trees.

Sir Anthony Ashly Cooper *versus* Saint John.
Trin. 24 Car. Rot. 267.

Trin. 1649.
between the
same Plaintiff
and Webb De-
fendant entered
Hill. 24 Car.
Rot. 426. the
same declara-
tion was ad-
judged good
upon a de-
murrer.

N. B. 93. d.

IN Trespas the Plaintiff declared quod cum he was seised of two Closes of pasture which were inclosed by him, and whereas there was a Common next adjoyning to them, the Defendant decem perticatas sepium clausⁱ prædictæ pasturæ prostravit & sic prostratas (for such a time) custodivit, per quod, the beasts depasturing in the Common, came into the Closes and eat the grasse there ad dam^u &c. the Defendant pleaded non culⁱ infra 6 annos. And after a Verdict for the Plaintiff, Mainard moved in arrest of Judgment, that it ought to have been vi & armis, because the Trespas is laid to be done in his own soil; and said, that in false imprisonment per quod he was compelled to pay 5 l. in a Case about seven or eight years since, Judgment was arrested for want of vi & armis: But the exception was disallowed and Judgment given for the Plaintiff without argument; for the conclusion per quod and the commencement quod cum shew it to be an Action of the Case, and the causa causans of the Damages may be laid vi & armis or without it, Lib. 950. f. Vide 13 H. 7. 26. f. which is no Law.

Quære if in Case of false imprisonment there be not a difference between a conclusion per quod & quousq; &c.

Mich.

Mich. 24 Car. Banco Regis.

Kynaston & Spencer *versus* Jones. Mich. 23 Car.
Rot. 589.

IN Debt upon a bond of 2000 l. bearing date 9 Martii Debt upon Award.
22 Car. with Condition to stand to the award of J. S.
and J. N. indifferently chosen Arbitrators of all matters
and controversies between the parties, so that they made an
award of the premises before the Feast of Easter next ensuing;
upon nullum fecerunt arbitrium ante festum Paschæ pleaded by
the Defendant; the Plaintiffs replied, that before the Feast
of Easter, viz. the 15 day of April following, the Arbitrators
did make their award, that the Defendant should pay to the
Plaintiffs 1200 l. at four payments; viz. on the 16 of October,
and the 16 of April; and that on the fourth of May he should
enter into four bonds for the payment, and should then pay to
the Plaintiffs 30 l. towards their costs and charges expended;
and that all Actions and controversies between the Plaintiffs
and Defendant should cease and determine, and that they
should seal and deliver to each other general Releases of all
controversies, suits, and demands, until the eighth day of
March, and time and place appointed for the doing of this.
And Assigned breach in not paying the 30 l. upon the fourth of
May; The Defendant rejoined that the Arbitrators nullum fe-
cerunt tale arbitrium modo & forma pro ut, & de hoc, &c.
whereupon Issue was Joyned, and by special Verdict it was
found that the sixth of Febr. 22 Car. the parties agreed to sub-
mit all controversies between them to Arbitrement, and that
22 Febr. 22. Car. the Plaintiff became bound to the Defen-
dant to stand to the award of the Arbitrators according to the
condition, ut supra, and that 9 Mart. 22. Car. the Defendant
became bound, ut supra, and that prædict' 15 die Aprilis 23 Car.
the Arbitrators made their award, reciting that the Plaintiffs
and Defendant became bound the 9 of March in 2000 l. a
piece to perform their award; and that the Defendant had re-
ceived of the Plaintiff 1000 l. an. 1641. which with Interest
amounts to 1460 l. and upwards, and that the Plaintiff had
been at Charges for the recovery thereof, and thereby awar-
ded, ut supra.

And upon this Verdict two questions were made.

3

1. Whe-

1. Whether upon this Issue the submission be in question?
 2. Admitting it be, whether the award upon the submission found be a good award? Et Term. Pasch. ult. the Case was argued by Philips for the Plaintiff, and Latch for the Defendant. And this Term by Hale for the Plaintiff and Mainard for the Defendant. And it was resolved by Bacon and Roll.

1. That upon this Issue the Jury cannot enquire of the submission, for that is admitted by the plea. And therefore the Defendant could not have set this matter forth in the rejoinder, thereby to have made good his bar; that the Arbitrators made no award, for the award in it self is a good award. And it would have been a departure in him to have alledged a matter extrinsecal to the award, which should prove it to be void; and for this Lincy and Alhtons Case 12 Car. in this Court was cited by Roll, where in debt upon a bond to perform an award, upon nullum fecerunt arbitrium pleaded, the Plaintiff set forth an award that the Defendant should pay 10 l. to the Plaintiff at the house of a stranger, and Assigned breach in non-payment; the Defendant rejoined that he could not come to the strangers house without being a Trespasser: and upon demurrer it was adjudged for the Plaintiff; for the award set forth by the Plaintiff was good; and the matter alledged by the Defendant in avoidance of it, was a departure from his bar. And therefore he ought to have alledged the whole matter in his bar. And so must he have done in this Case if he would have taken advantage of the submission; and he said, that 14 Car. Judgment was affirmed in the Exchequer, and both points resolved accordingly.

2. Against the award it was objected, that thereby the bond made by the Plaintiff to the Defendant should be released, but the Defendants bond should stand; for the award, that Releases should be made of all Actions, &c. till the eighth of March, is entire, and cannot be apportioned in respect of time, that is, bind as to the time before the first bond, and be void as to the time after.

But it was resolved, that the award in this Case was a good award; for the award that all Suits between the parties should cease, is a good award on both sides and sufficient satisfaction for the money ordered to be paid by the Defendant; and then though the award be void as to the Releases, it is not material;

material; and the Case between Vanbore and Trigge, 14 Jac. in this Case was cited, where an award that all Suits between the parties should cease, and that they should make mutual Releases one to the other till the day of the award, was adjudged good as to the first part, and void for the Releases, because thereby the bond of submission should be released; but where the award is, that they shall make general Releases without fixing to any time, this will be good, because it shall be construed to the time of the submission only.

And it was agreed, that the misrecital of the Arbitrators doth not prejudice their award. And it was touched by the Defendants Counsel, that the submission was void, because at several times, but not insisted on; for the Court held it clearly to be good. And an exception was taken to the Verdict, for that they have not found the award to be made before Easter, and the Court cannot take notice *ex officio*, that the 15 of April was before Easter: But to that it was answered, that the Plaintiff in his replication hath alledged it to be before the Feast of Easter, viz. 15 April. And the Defendant in his rejoinder hath omitted the words *ante festum Paschæ*, so that the time is not in Issue. And upon this reason Mr. Hales told me the Court rested for that point, for he held that the Court otherwise could not take notice of the time *ex officio*, though Mr. Weston said, that the opinion of Roll was, that they might if they pleased. And Judgment was given for the Plaintiffs in my absence, through sickness; but their Opinions were declared, *ut supra*, before.

Note, Trin. 1649. The same Case came again in question, upon an Action brought by the same Plaintiffs against the Defendants Son, who became bound with his Father, and it is entered Pasch. 1649. Rot. 249. And there the Defendant in his bar sets forth the whole matter and the award verbatim (with *cujus tenor sequitur in hæc verba*) in English. And upon demurrer without argument adjudged for the Plaintiff, because it ought to be set forth in Latin, and so Roll then chief Justice said it had been ruled before; and so it is in Case of a bond to perform Covenants in an Indenture, they must be set forth in Latin. And Roll declared the award to be good for the reasons aforesaid, and so he said he and Bacon had delivered their opinions before, and the manner of pleading it by *cujus tenor*, &c. was naught.

Dame

Dame Bowles versus Broadhead. Hill. 23. Car.

Rot. 1578.

Debt.

IN an Action of Debt for 200 l. upon the Statute of 2 E. 6. for Tithes of land in the Parish of Rinston *alias* Royston, the Defendant pleaded the Statute of 31 H. 8. And that the Lands were discharged in the hands of the Prior of mount Bretton, at the time of the dissolution, and Issue joyned upon the discharge: and upon a Trial at bar, the Defendant not making good his Plea, the Court ruled the value to be taken as confessed, because the Issue is joyned upon a collateral point. And the Defendant took not the value by protestation, and so the verdict was given for Two hundred pounds, but neither damages nor costs.

Amys versus Cowley.

Ejection.

IN an ejectione firmæ of Lands in Blandford Forum, upon not guilty pleaded between John Rogers and the Lord Rich, who married his Brothers widdow; the Case fell out to be thus, The Lands in question were called Nutford farm, and lay in the Tithing of Rushton, within the Parish of Blandford Forum, but not within the Borough of Blandford Forum. R. being seised of that Farm, and of other Lands within the Borough, covenanted to levy a fine of both to certain uses; and the deed of Covenant described the Lands to be in the Parish of Blandford Forum (the Borough and Tithing being both within the Parish). And accordingly a fine was levied of Lands in Blandford Forum generally, not naming it a Ville or Parish, but the number of Acres was sufficient to pass all the Lands within the Borough and Parish. And whether an averment might be taken by the deed, that the fine was intended of Lands within the Parish (for otherwise the fine must be taken as of Lands within the Ville only) was a question directed by Bacon and Roll to be found specially, if the Verdict

2 H. 5. 7. h.

Verdict passed upon that point. And in this Case it was a question upon the evidence, whether the receiving of Rent by him that hath a reversion upon an estate for life make a possessio fratris? And the opinion of the Court inclined that it doth not, and the Quære in the Institutes 15 cap. was mentioned by Roll.

*Cases at Nisi prius in Guild-hall London,
before Hen' Roll Justice de Banco Regis,
Term' Trin' 24 Car.*

Johnson versus Rawle.

Assumpsit.

IN an Action upon a Promise, the Defendant pleaded a submission of all matters in difference to Arbitriment, and an award, &c. the Plaintiff denied the submission modo & forma, and Issue being joyned thereupon, the evidence was of a submission of all matters touching accompts, and allowed good evidence; and because the Plaintiff could not prove that there were other matters in difference, but matters of accompt, he was non-suited. Hale and Mainard being of his Counsel.

Ludlow versus Beckwith.

Ejectionment.

IN an Ejectione firmæ, upon not guilty, the Case upon evidence was, that A. devised a House to B. for life, with power to make Leases for Twenty one years rendring Ten pound rent per annum, payable at Michael' or Twenty days after; B. made a Lease for Twenty one years rendering Ten pounds rent per annum payable at Michaelmas. And the questions were,

1. Whether the words (at Michaelmas or Ten days after) were to be taken in sensu diviso, and so the distribution to his power of making Leases, or in sensu conjuncto and so the distribution to the payment of the rent ?

2. If taken the last way, Whether he had persued his power in effect ?

Mainard. That the power was persued. Hale e contra. But Mainard agreed, that if he had reserved the rent payable Ten days after Michaelmas, then he had not persued his power, because

cause the reservation is not so beneficial in it self for the heir of the Debisor, in favor of whom the power was qualified: But the Case fell off, and Roll inclined not one way nor other.

Davies versus Dyos.

IT was ruled by Roll, that a Trover would lye for money Trover.
which was delivered by the Plaintiff himself to the Defendant to keep, though not in bags. Both which points, he said, had been doubted and resolved.

Sir Richard Sprigwell versus Io. Allen.

IN an Action upon the Case for falsely and fraudulently selling Action sur Case.
an Horse to the Plaintiff, as the proper Horse of the Defendant, ubi revera it was the Horse of Sir J. L. because the Plaintiff could not prove that the Defendant knew it not to be his own Horse (for the Declaration must be that he did it fraudulently or knowing it to be not his own Horse) for the Defendant bought the Horse in Smithfield, but not legally Colled. The Plaintiff was non-suit.

IN an Action upon the Case for malicious prosecution upon an Indictment; one of the Jurors names in the Declaration was Lancaster, and in the Record it was Lancaster; and ruled no variance though of different sound, but shall be intended the same Record. *Contrà Mainard qui fuit pur le Defendant.* Action sur Case.

Combs *versus* Cheny.

Trover.

IN a Trover and Conversion; upon not guilty, the evidence was that the goods were taken and sold by vertue of a Commission of Sewers. And it was ruled,

1. That this matter might be well given in evidence, upon not guilty pleaded, as deteigning of beasts in a Market for toll.

2. That the Commissioners of Sewers may sell the distress, which Roll said was a doubt to him and Bacon, in Quinzy and Fawsets Case, quod vide Term. (so the Issue was found for the Defendant.)

3. That the Jury should not tax treble damages; for the Statute is to be intended only when he justifies by vertue of the Commission of Sewers, so that the matter appears upon the Issue.

Debt.

IN Debt upon a bond of Ten pounds, and per duces pleaded, the Case upon evidence was, that the Plaintiff charged the Defendant with felony for stealing a Horse, and procured a warrant from a Justice of Peace, to a Constable, whereby he was taken. And being in custody, upon promise of the Plaintiff to discharge him, sealed the Bond and was thereupon immediately discharged. And it appeared that the Horse was the Defendants own Horse. And Roll directed the Jury that these proceedings being but to cover the deceit, the Bond was gotten by duces, whereupon the Plaintiff was non-suit.

Kenrig

Kenrig *versus* Eggleston.

IN an Action upon the Case, against a Country Carrier for not delivering a box with goods and money in it; the evidence was, that the Plaintiff delivered the box to the Carriers Porter, whom he appointed to receive goods for him, and told the Porter that there was a Book and Tobacco in the box, and in truth there was an Hundred pounds in it besides. And it was agreed by the Counsel, and given in charge to the Jury, that if a box with money in it be delivered to a Carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one Barcrofts Case, as Roll said, where a box of Jewels was delivered to a Ferry-man, who knowing not what was in it, and being in a tempest, threw it over-board into the Sea: and Resolved that he should answer for it. Action for Case.

2. Roll directed, that although the Plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the Carrier all the particulars in the box. But it must come on the Carriers part to make special acceptance. But in respect of the intended cheat to the Carrier he told the jury they might consider him in damages, notwithstanding the Jury gave 97 l. against the Carrier, for the money only (the other things being of no considerable value) abating 3 l. only for carriage, quod durum videbatur circumstantibus.

Alwin *versus* Taylor.

IN Trover and Conversion of divers quarters of Halt; the Case upon the evidence was, That the Defendant having a great quantity of Halt in a Tessel, impowered one Smith a Broker to sell it; and afterwards the Defendant himself sold it to a stranger, and the same day, and before notice of the sale by the Defendant, Smith sold it to the Plaintiff, Trover.

B b

who

who demanded it of the Defendant, who denyed to deliver it. And the Case was doubtful to Roll, for if the Defendants sale should stand against the sale of Smith before notice of the first sale, then should he be chargeable for his bargain, which he could not perform without any default in him. And on the other side, it were hard that the sale of the owner, who had the absolute property in the goods, should be defeated by a subsequent sale of him that had but a bare authority. But in conclusion he declared his opinion, That the sale of the Defendant should stand good, and the Broker ought in such Case to make his sale conditionally, if the Master hath not sold it before; but he said that neither the Broker nor his Vendor should be liable to any Action for detaining the goods, though demanded, without notice given of the sale by the Master. Et partes concordaverunt.

Duncomb *versus* Tickridge.

IN an Action upon a Quantum meruit, for Dyet, Lodging and Apparel; the evidence was, that the Defendant being an Infant was sent with a Russia Merchant beyond Sea by his Mother, who did agree to pay him so much for Dyet, Washing and Apparel. And the Merchant in Russia committed the care of the Infant to the Plaintiff, and promised to pay him for his Dyet, Lodging and Apparel. And Roll directed the Jury, that if an Infant comes to a stranger and boards with him, there is a contract in Law implied, that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract. And the Verdict was accordingly found for the Defendant.

UPon evidence it was said by Roll for Law, That if a Lease for years be made, rendering seven pounds rent per annum, and there be three pounds behind, and at the next day

day the Lessor demands Ten pounds rent; this is no good demand, whereby to take advantage of a condition, because he takes it as an entire sum; but he must demand the seven pounds which then becomes due, and if he demands the arrears also, that is good enough.

Smalman *versus* Hutchinson.

THE condition of a bond to save the Obligor harmless, ^{Obligation.} concerning his buying of certain goods at such a price, extends not to the price but the title, as was clearly agreed upon evidence between them.

F I N I S.

T H E T A B L E.

A.

Abatement.

IF a Writ abate one day and another Writ is purchased bearing Test the same day, it shall be intended after the abatement of the first. 34

Action on the Case.

For infected Cattle per quod diversa averia of the Plaintiffs interierunt, without naming how many, and good, because not brought for the Beasts themselves or value of them, but for dammages sustained by their death. 22

Where in an Action on the Case the causa causans of the dammages may be laid vi & armis or without. 84

Action on the Case for fraudulently selling a horse to the Plaintiff for his own, &c. 91

Against a Carrier for goods delivered, although he do not know the Contents. 93

Action on the Case for false practice in creating trouble, &c. to the Plaintiff. 3

Upon slandering a Title, though the party hath remedy against the Tres-

passer, yet an Action lies against him that caused the disturbance. 3
Slander where he lost his marriage, and no agreement of marriage or mutual love alledged, and the words spoken only with an innuendo, and good. 6

Action on the Case for Words.

I accuse you to be a Witch and desire to have you searched, &c. not actionable, because the Words do not import an accusation of an offence within the Statute. 2, 3.

Words charged with procuring Felony, actionable. 5

To call an Attorney Knave, when the subsequent words intend it of his Profession, there needs no Colloquium of his Profession. 13

I. S. is a Thief and stole my Wood. 11

Where latter words qualifie the former. ibid

I. S. is forsworn and his Oath appears upon Record, an Action lies. 7

Where in an Action of the Case for Words, Justification explains the parties meaning. ib.

Thou hast had the French-Pox. 31

Thou art a Thief and hast stolen my Dung, actionable, because in common parlance its understood of Dung in a heap, which is a Chattle. 32

C c

Tou

The Table.

Tour Son is a Thief innuendo, &c. and actionable, because the Court shall not intend any other Son than the Plaintiff. But to say your Landlord (without a surname) is a Thief, is not actionable, without averment he had no other Landlord. 32

Traitorly Rogue, is actionable, so Branded Rogue. 35

Thou didst & dost buy and receive stolen goods, &c. not actionable, because it doth not appear that the party was consenting to the stealing. 57

You are a Buggering Rogue, &c. actionable. 61

Of a Parson, that he was a Drunkard, a Whoremaster, &c. actionable, because thereby he may be degraded, which is a temporal damage. 63

She hath married the Husband of another woman, not actionable. 37

She is a Sorceres and a Witch, and can witch and unwitch, not actionable, because not accused of any offence within the Statute. 37

Administration.

Administration granted to the Sister of the half blood of the Intestate, not to be repealed by the Brother of the whole Blood, otherwise if she be married. 36

Administration executed cannot be repealed, because the Administrator will not make distribution according to agreement. 56

In retardatione Administrationis, where it shall be a good Plea. 1

Letters of Administration granted per Carolum Regem, without saying debito modo. 53

Amendment of a Record.

Where it is in a material part it shall vitiate the whole Record. 70

Arbitrement.

Debt and other controversies lie in Arbitrement, though Debt solely doth not. 4

Where Arbitrement is no Plea in Debt, it is no Plea in Assumpsit upon the Debt. 5

Where Arbitrement doth not reach the thing demanded. 5

An Award that the Defendant should pay so much to the Plaintiff, and that the Plaintiff should pay for the writing of the Award, and judged void. 10

The Defendant to pay to the Plaintiff in satisfaction of all controversies between them until the day of the Award made, and good; for the Court shall not conceive any new controversy arisen between the submission and the Award, unless the Defendant shew it. 26

In Arbitrement where the Jury cannot inquire of the submission for that it is admitted by the Plea, and to prove the Award void by matter extrinsical shall be adjudged a departure. 86

An Award that all Suits between the parties should cease, and make mutual Releases to the day of the Award, is good for the first part but void for the Releases. 87

Misrecital of the Arbitrators doth prejudice their Award. ibid

Submission to an Award not void although made at several times. ib.

An

The Table.

An Award ought to be pleaded in Latin, and so of a Bond to perform Covenants, and the manner of pleading an Award by *cujus Tenor*, &c. is naught. ibid

A Submission of all matters in difference to Arbitrement, and the Evidence proved a Submission of all matters touching Accompts, and good. 90

Where a promise to perform an Award shall be collateral to the Submission. 70

De præmissis pleaded in Awards how to be applied to the general words of the Award proportionable to the things submitted. 52

Where Submission to an Award is not with an *ita quod*, an Award to parcel of the things in controversy shall be good. ibid

Matter subsequent to the Submission shall not be intended a good recompence. 10

Assumpsit.

Where the Husband brings an Action in his own name, upon promise to the Wife, and lays the promise made to himself. 1

Upon a promise for bringing up Children, without saying they were the Plaintiffs, and good. 6

Upon promise of money to marry a poor Virgin. ibid

Against a servant, who retained an Attorney for his Master, and promised him his Fees, and good. ib.

Assumpsit brought by an Attorney for Charges disbursed, &c. the Defendant pleads the Statute 3 Jac. it doth extend to a special Action upon his promise. 4

Where a Promise inter alia is not good, but ought to set forth the whole matter. 5

Promise to pay 15 l. annuatim pro quolibet anno, if I. S. live so long, an Action lies after the first year without averring the life of I. S. if being a limitation subsequent. 20

Promise to pay so much as I. S. was damnified, and good, without giving notice how much. 21

Promise to give the Plaintiff 2 s. for every Piece of Cloth he should buy, and avers he bought 100 pieces, for which he demands 10 l. not good without notice given to the Defendant. 24

Assumpsit will not lie for Rent, but Debt. 29

Promise made to the Husband and Wife, its in the Election of the Husband to bring the Action in his own name, or to join his Wife. 36

A Promise or Bond not to use a Trade in a particular place is void, if it be without consideration, but if it restrain generally, its void though there be a consideration. 67

Where the Mother consents that the Daughter should marry I. S. is a good consideration of a Promise. 68

Attornment.

Lessee for years attorns to the grantee of a Reversion, the grantee shall have the Rent due from the day of the Attornment. 34

Where Lessee may attorn before Entry. 59

Letter of Attorney different from the Authority given *ore tenus*, he cannot execute his power by virtue of both. 53

Averry

The Table.

Avowry.

In Avowry the Traverse ought not to be larger than the Avowry. 33
In Avowry for taking 100 oves matrices & vervices, and doth not shew how many Ewes and how many Wethers, not good, for the Sheriff is to make deliverance according to the Writ, and he is not bound to receive information from the party. ibid

C.

Copyhold.

WHERE the King shall have the Trust of a Copyhold. 14

Construction of Words. See Words.

Covenants.

Where the breach ought to be assigned, when and where, that it may appear to the Court to be legal. 19
The difference between a duty or charge created by Law, and when by Covenant or act of the party. 27
A Covenant to pay money upon several Bonds at the several days limited in the several Bonds, or 8 days after, no breach till after the 8 days. 60
Covenants are common Assurances favoured in Law. 38
Covenant no Duty nor cause of Action till broken, and therefore not discharged by Release of Actions. 39
Covenant to perform certain Inden-

tures, and to save the Plaintiff harmless, he cannot plead generally performance of Covenants, because some may be in the Negative, and also he ought to shew how he saved him harmless. 72

Covenant is intire and cannot be apportioned. 9
Where the Contract is in the realty, and the Debt ariseth in respect of the profits, an Action will lie before the last day. 58

D.

Declaration.

Declaration in Trespass the Plaintiff need not to answer the order of time wherein the Trespases were done. 20
In an Indebitat. Assumpsit its set forth in the Declaration in consideration quod venderet & deliberaret, and no averment of any sale or delivery, not good. 61

Demurr.

He that Demurs upon the Evidence ought to confess the whole matter of fact to be true, and not to refer that to the Judgment of the Court 18.

Devise.

By a Devise of the rest of all my Lands what estate passes. 28
Where an authority to take the profits implies as much as a Devise of the profits, which gives an Interest. 45

The Table.

A Devise to the Issue male with remainders to the younger Sons, proviso, if the eldest die without Issue male, his daughter, &c. shall hold the lands until, &c. she shall have but a Chattle. 46,47

An actual Devise by words is not sufficient for a stranger to write the Will, but there ought to be an actual Will. 54

Where the Devisor becomes senseless before the Will is written, yet if it be written before he dies, its a good Will. 55

A Will gnawn in pieces by Rats, yet by help of the pieces put together, was afterwards proved and good. 2

Discent.

No Discent without dying seised. 33

Discontinuance.

Where an Action shall be discontinued. 20

E

Error.

THE Venire facias bore Teste Pasch. 20 Car. and Issue joyned Pasch. 21 Car. no Error but holpen by the Statute of 18 Eliz. cap. 4. 20

In Trespass against three, and one dies hanging the Writ, Judgment against all three shall be reversed, because entire. 74. *Otherwise in an Action at Common Law where damages are given by the Statute.* 75

Estopple.

Covenant pleaded by way of Estopple. 79

Condition that if the Defendant would pay the Plaintiff so much for carrying so many Billets, &c. that then the Obligation should be void; the Defendant pleads that the Plaintiff did not carry, &c. and upon Demurrer, Judgment for the Plaintiff; the Defendant shall be estopped to deny it. 52

Executors.

Debt against Executors in the Debet & Detinet. 34

Where goods delivered to Executors shall be Assets in their hands, where contingent Covenants happen after.

Executors shall be intended consant of all contracts of the Testator as well contingent as certain. 38

Executors not liable to pay Legacies without caution against contingent Covenants. 39

Executors where chargeable in the debet & detinet, where in the detinet only. 43

Where part of arrears demanded were due in the time of the Testator, and part after his decease; the Action in the Detinet is good for the whole. 76

An Action brought in the Detinet against an Executor who pleads nil debet, may be holpen by the Verdict.

Where Damages recovered shall be Assets. I

D d

Husband

The Table.

H

Husband and Wife.

Promise to the Husband and Wife
it's in election of the Husband
to bring the Action in his own
name or to joyn his Wife. 36

Where the Husband is not charged in
the Debt & detinet because the
Husband is Debtor, but because the
Husband and Wife are but one
person in Law. 73

Account by the Husband and Wife af-
ter marriage for goods bought by
the wife when sole, this Account
doth not alter the nature of the
Debt. 73

Where the Husband shall be sued upon
an Indebitatus assumpsit for neces-
sary Wares sold to the Wife. 61

I.

Indictment.

Where Indictment need not
conclude contra formam
Statuti. 44

Where several are indicted in the Sta-
tute of 1 Jac. c. 8. of Stabbing,
and it doth not appear which gave
the thrust, they shall be guilty of
manslaughter. 44

J. S. was Indicted for not taking his
Oath being chosen Headborough, it
must appear that he was warned be-
fore a Justice of Peace and there
refused. 78

Indictment quashed for repugnancy,

viz. quod pacifice intraverunt,
& adtunc & ibidem vi & armis
dissessiverunt. 50

Indictment of forcible detainer and
concludes contra pacem only, and
not contra coronam. 49

Where it shall be manslaughter to kill
another, although he had no inten-
tion to do him mischief. 12

Acts not warranted by Law, the par-
ties that use them ought at their
own peril to prevent the mischief
that may ensue, for consent will not
change the Case. ib.

Infant.

Where an Infant comes to a stranger
and boards with him, the Law im-
plies a contract for his Dyet, Lodg-
ing, &c. but where another under-
takes for his boarding, this expref-
agreement takes away the implied
Contract. 94

Inrolment.

Debito modo Irrotullat' in Curia
Canc' &c. not good without alledg-
ing the Inrolment to be within six
moneths, or secundum formam
Statuti. 19

Jury.

Juror challeng'd because he was tenant
of a Mannor to which there was a
Court Leet, of which the Plaintiff
was Steward, and no principal
challenge. 29

Juror challeng'd by the Defendant, so it
treit said the Plaintiff, but not al-
lowed,

The Table.

lowed, for that must be upon the challenge and not upon the Trial.		Legacies devised in specie not to be taken without assent of the Executors.	ib.
Jury bound over to the Star Chamber for not finding according to the direction of the Court.	30 12	Where a Covenant is broken before the delivery of Legacies, the Administration shall work a Devastavit.	39,40
L.		How far the Common Law takes notice of giving remedy to recover Legacies.	40
Leases.		M.	
Where an Ouster le main is necessary, a Lease for years made before is not good.		Mistomer.	
A Lease for years habendum from henceforth includes the day of making, but habendum from the day of the date excludes the day of the date.	30 76,77	IN a Demise if it appear to be the same person that demised though misnamed, it is sufficient; otherwise where the name is part of the Issue.	
A Lease habendum a die datus and for seven years hence forth, how it shall be construed.	77	N.	
Where Lessee for years holds over his Term, and pays his Rent quarterly as before, he becomes Lessee at Will.	4	Notice.	
Tenant at Will paying quarterly, begins a new quarter over, he shall pay that Rent, although he determine his Will before the quarter expired.	ibid.	Where notice is to be given to the Defendant in an assumpsit for so many goods bought by the Plaintiff for the Defendants use at such a rate.	
Legacies.		Condition of a bond to make an estate of inheritance to the obligee by such a day, the Defendant ought to give the Plaintiff notice; if for the making of a feoffment, otherwise, for the Plaintiff at his peril ought to attend.	
Difference between Debts without speciality and Legacies.	39	Where a Broker hath power to sell goods, and the Owner sells them, and afterwards the same day the Bro-	
Executors not compellable by the Ecclesiastical Court to pay Legacies, except Legatees give caution to repay them upon contingent covenants broken.	39		

The Table.

<p>Broker sells them, he shall not be liable to an Action for detaining though demanded, without notice given of the first sale. 24</p> <p>Promise to pay so much as I. S. was dammified, and good without giving notice how much. 21</p> <p>Promise to give the Plaintiff 2s. for every Piece of Cloth he should buy, and averrs he bought 100 Pieces, for which he demands 10 l. not good without notice given to the Defendant. 24</p>	<p>Where an Ouster le main is necessary, a lease for years made before is not good. ib.</p>
<p style="text-align: center;">O.</p> <p style="text-align: center;">Obligation.</p> <p>Obligation void because the condition was for maintenance. 60</p> <p>Condition to save the Obligee harmless concerning buying certain Goods at such a price, this extends not to the Price but the Title. 95</p> <p style="text-align: center;">Office.</p> <p>Where the Kings title is found by one Office it is a Record intire of it self, and shall not be taken as it stands in comparison with another Office. 30</p> <p>Where the Kings intrest shall commence by Office before Seisfure. 30</p> <p style="text-align: center;">Ouster le main.</p> <p>Where land shall continue in the Kings hands for a third part till an Ouster le main sued, though the Heir be dead. 30</p>	<p style="text-align: center;">P.</p> <p style="text-align: center;">Perjury.</p> <p>One convicted for Perjury and Fined 10 l. although there was no malice in it. 79</p> <p style="text-align: center;">Plea.</p> <p>In Debt for Rent, where it is no good Plea that Alien Enemies entred and expelled him. 27</p> <p>The difference where the Law creates a duty or charge, and the party is disabled to perform it without any default in him, and when the party by contract creates a duty upon himself. ibid</p> <p>In Debt upon Bond the Defendant pleads the Statute of 23 H. 6. and that he was in custody, and that the Bond was for his enlargement, and concludes non est factum, which ought to have been, judgment Si Actio, &c. and held naught. 58</p> <p>In a Debt upon a single Bill the Defendant Pleads payment of part after imparlance and darrein continuance, and not good without acquittance shewn. 63, 65.</p> <p>Where a Plea concludes in abatement, it is not peremptory, but if a Plea in abatement be pleaded in Bar, it is peremptory. ib.</p> <p>A Plea pleaded after Imparlance, and Issue tendred upon it, yet it is not Peremptory upon a Demurrer. ib</p> <p>If after issue joined the Defendant pleads</p>

The Table.

pleads a Plea in abatement, this is peremptory as well upon Demurrer as by Verdict. 66

The diversity between a Plea in abatement and a Plea to have Aid. ib

Upon fully administered pleaded, and the Issue whether Assets or no, and Assets found for part only, yet judgment to recover the whole shall be good. 37

Accord a good Plea in Covenant. 39

A Bond made to two, and the Survivor brings an Action in his own name, non est factum is no Plea. 42

Plene Administravit, a good Plea to a charge by Judgment. 48

Where an argumentative plea is insufficient upon a general Demurrer. ib.

Per duces, where it shall be a good Plea to avoid a Bond fraudulently obtained. 92

Of a Bond made in one County, and the Declaration alledged in another upon the Statute of 6 R. 2. 17

Prohibition.

After administration granted the Ordinary hath not power to compel the Administrator to make distribution, and if he go about to repeal the Letters for not doing it, a Prohibition lyeth. 56

Promise. Vide Assumpsit.

R.

Recognizance.

A Scire facias against three Baylees upon a Recognizance acknowledged jointly and several-

ly, and not good: Otherwise in debt upon a Bond, for there the Defendants ought to shew that the parties were in full life at, &c. 21

Releas.

In debt upon a Bond of 200 l. for payment of 104 l. a Releas of a Bond of 200 l. for the Payment of 100 l. is not good, although it be averred there is no other Bond made by the Defendant. 71

Rent.

Debt by an administrator for Rent upon Assignment of a term for years by Deed, adjudged no Rent but a sum in gros. 57

Debt upon the Statute of 32 H. 8. against Occupiers for arrears of a Rent charge. 62.

Lease reserving 7 l. Rent, and there is 3 l. more behind, the Lessor cannot demand 10 l. whereby to take advantage of a Condition, because its an intire sum. 95

Request.

Request where to be made by the Defendant before the Plaintiff is to make his Election. 25

Request where it shall be well made. 25, 26

S.

Sewers.

Commissioners of Sewers, Quære if they may sell a Distress. 92

E c Sta.

The Table.

Statutes.

To what Courts the Statute of 21 Jac. and the Statute of Jeofails shall extend. 64

Stat. 1 Jac. 8. of Stabbing how construed, where several are indicted, and it doth not appear who gave the thrust. 44

Surrender.

If Lessee for life accept of a Lease for years, this shall be a Surrender of his Estate for life. 59

Survivor.

A bond made to two, and one survives, he may bring the Action in his own name, so if a charge survive; otherwise where nothing survives as in feoffment. 42

T.

Trespass.

One cannot justify a Trespass upon another for fear. 35

Trover.

Trover will lie for money delivered by the Plaintiff to the Defendant to keep, though not in Bags. 91

Trust. Vide Uses.

V.

Varians.

I*N an Action on the Case where one of the Jurors names was Lancaster, and in the Record it was Lancaster, and ruled no Variance.* 91

Venire facias. See Writs.

Verdict.

Where a Verdict shall not make a declaration good which wants convenient certainty. 19

Where the Declaration varies from the Verdict, and good. 28

Where in an Action on the Case for words and shall not be supplied by exceptis his verbis. 31

Uses.

What they were at the Common Law. 14

Trusts are at this day ruled as Uses were at Common Law. 15

Where the Husband shall have a Trust by Survivorship. 16

Where a Trust of Copyhold land is forfeited to the King he shall have the Land it self. 15

W.

Wast.

T*enant for life, the remainder for life, and Tenant for life cuts down Timber trees, he in the rever-*

The Table.

<i>reversion may seise them, although he cannot have an Action during the life of him in remainder.</i>	81	<i>construed repugnant.</i>	59
<i>But where a Lease for years is made without Impeachment of wast, such exception is good.</i>	82	<i>Lessee for life with power to make Leases for twenty one years at ten pounds per an. payable at Mich. or ten days after, whether these words are to be taken in sensu diviso or conjuncto.</i>	90
<i>Lessee for life with a contingent remainder is no bar to him in reversion to bring an Action of wast.</i>	16	<i>Habendum a die datus and for three years from hence forth how to be construed in a Lease for years.</i>	7
<i>Lessee for life cuts Timber trees, he in Reversion to bring a Trover though he did not seise them.</i>	ib.	<i>Decimæ garbarum what is comprehended therein.</i>	80
<i>Lessee for years cuts down Timber trees, and some distance after carries them away, Trespass vi & armis lies; and in such case felony may be committed.</i>	83	<i>Where words make a contingency by the intention of the party.</i>	8
		<i>Where words are general in a Bond, yet may be limited.</i>	10
		<i>The difference between the words and and for.</i>	

Construction of Words.

<i>Per unam acram ligni, not only the the word, but the soil it self shall pass.</i>	20
<i>If where it shall be taken as a limitation subsequent.</i>	20
<i>Where Postea shall refer to the time immediately precedent.</i>	23
<i>Where Scilicet is but explanatory and for instance, and cannot contradict any thing that is precedent.</i>	23, 24
<i>The word Rest in a devise how construed.</i>	28
<i>The construction of the word for in an Action on the Case for words.</i>	31
<i>Where the latter words qualifie the former.</i>	11
<i>Where a man grants his land, & totum statum suum; habendum for sixty years, the habendum shall be</i>	

Writs.

<i>If a Writ abate one day, and another Writ is purchased bearing Teste the same day, it shall be intended after the abatement of the first.</i>	34
<i>Where an alias Venire facias shall be awarded, and not a Venire facias de novo.</i>	18
<i>Where a Venire facias shall be awarded for insufficiency of the verdict.</i>	31
<i>Scire facias to be brought where the Recognizance was taken, but the usual entry in Banco Regis is to express before what Judge it was taken, but no place where.</i>	13
<i>Venire facias in Chancery returnable in Banco Regis.</i>	14
<i>Where abundans cautela makes not the Writ vicious.</i>	ibid.

F I N I S.